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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

In 1978, Congress passed the Airline Deregulation Act. Section 43 thereof authorized certain protections against employment dislocation caused by deregulation. The protections included a hiring preference scheme under which certain air carriers certificated as of October 24, 1978, would be required to hire, before other more qualified applicants, certain former employees of their competitors with whom they have had no previous employment relationship ("protected employees"). Section 43 does not *require* a carrier to hire its own former employees or *impose* any hiring duty on carriers certificated after October 24, 1978.

As construed by the Department of Labor in its November 1983 regulations, issued almost five years after the statutory deadline, the hiring duty even applies to employees terminated for reasons completely unrelated to deregulation. Therefore, the questions presented are:

(1) Whether Section 43, by imposing the hiring duty *exclusively* on pre-1978 carriers that have no prior relationship with a "protected" applicant, while exempting the applicant's former employer as well as all post-1978 carriers, violates standards of equal protection and due process set forth by this Court in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); and *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), which require that statutorily imposed discrimination be rationally related to a legitimate governmental interest.

(2) Whether the imposition on certain air carriers, which have not contributed to employment dislocation and are not seeking any government approval or benefit, of a general duty to hire former employees of their com-

petitors, with whom they have had no previous relationship, violates the due process and takings clauses of the Fifth Amendment as applied in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), and *Connolly v. Pension Benefit Guaranty Corp.*, 106 S. Ct. 1018 (1986), by imposing a statutory burden on specific employers that have no connection whatsoever to the injury Congress intended to remedy.

(3) Whether the imposition of a duty to hire employees furloughed or terminated for reasons completely unrelated to deregulation is contrary to the articulated legislative purpose of protecting employees adversely affected by deregulation.

(4) Whether the Department of Labor was authorized to issue substantive regulations almost five years after its Section 43(f) statutory authority had expired and whether its construction of the statute to extend the hiring duty to employees not affected by deregulation contravenes this Court's precedents requiring that the scope of regulations be consistent with the design, origin and purpose of the statute.

PARTIES TO THE PROCEEDINGS

Petitioners are Alaska Airlines, Inc.; American Airlines, Inc.; Delta Air Lines, Inc.; The Flying Tiger Line, Inc.; Midway Airlines, Inc.; Northwest Airlines, Inc.; Piedmont Aviation, Inc.; Trans World Airlines, Inc.; United Air Lines, Inc.; USAir, Inc.; and Western Airlines, Inc.[1]

Respondents are William E. Brock, individually and as Secretary of Labor (as successor in office to Raymond J. Donovan); United States Department of Labor; the United States of America; and the following intervenors: Air Line Pilots Association, International; Association of Flight Attendants; Brotherhood of Railway and Airline Clerks; Flight Engineers' International Association; International Association of Machinists and Aerospace Workers; and Transport Workers Union of America.

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[1] In accordance with Supreme Court Rule 28.1, the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of petitioners are set forth in Appendix F hereto.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Alaska Airlines, Inc. and ten other airlines hereby petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The judgment and the memorandum of the court of appeals affirming the district court in part, reversing the district court in part and vacating and remanding the district court in part is reprinted as Appendix ("App.") A (1a).[1] The opinion of the district court is reported at 632 F. Supp. 178 (D.D.C. 1986), and is reprinted as App. B (6a).

JURISDICTION

The opinion and judgment of the court of appeals was entered on January 30, 1987. The court of appeals denied petitioners' petition for rehearing and suggestion for rehearing en banc on March 9, 1987. App. C (19a); App. D (20a). On May 27, 1987, the Chief Justice signed an order extending petitioners' time for filing a petition for a writ of certiorari to July 7, 1987. This

[1] Citations to material printed in the Appendix appear as "——a."

Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Fifth Amendment.

Section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1552 (1982).

Department of Labor regulations under Section 43 of the Airline Deregulation Act of 1978, 50 Fed. Reg. 53,094 (1985).

The constitutional provisions, statutes and regulations involved are reprinted in App. E (21a).

STATEMENT

On March 25, 1987, this Court decided *Alaska Airlines, Inc. v. Brock*, 107 S. Ct. 1476 (1987), holding that the legislative veto in Section 43 of the Airline Deregulation Act ("Deregulation Act") is severable from the remaining provisions of that section. A threshold issue in this case—whether Section 43 is unconstitutional in its entirety—has thus been resolved. This petition addresses petitioners' specific constitutional and statutory challenges to the substance of the duty-to-hire provisions of Section 43 and the Department of Labor's ("DOL") regulations implementing those provisions.

A. Nature of the Case.

Petitioners are eleven airlines certificated by the Civil Aeronautics Board ("CAB") prior to October 24, 1978.[2] On that date Congress enacted the Deregulation Act to phase out economic regulation of domestic aviation, to encourage the entry of new air carriers, and to foster competition on routes and fares. *See* 49 U.S.C. app. § 1302. As protection against the "theoretical possibility" that some employees might lose their jobs as a result of deregulation, Congress authorized labor protections in Section 43 of the Deregulation Act. S. Rep. No. 631, 95th

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[2] One of the appellants below, Ozark Airlines, Inc., has merged into petitioner TWA.

Cong., 2d Sess. 113 (1978) ("Senate Report"). Section 43 established an Employee Protection Program ("EPP") that, for a period of ten years, authorized certain benefits for "protected employees" (*i.e.*, employees who as of October 24, 1978 had at least four years of employment with a CAB-certificated interstate airline). Section 43 (h) (1); 49 U.S.C. app. § 1552(h) (1) (1982).

The EPP was to be one program with two interrelated parts: first, government assistance payments to certain "protected employees," [3] and, second, to reduce the demand on federal funds, a hiring preference under which certain air carriers would have a duty to hire "protected employees" terminated or furloughed by competing airlines. Section 43(d); 49 U.S.C. app. § 1552(d). Protected applicants must meet a hiring carrier's minimum job qualifications. Congress expressly required DOL to promulgate regulations implementing the EPP by April 24, 1979, six months after enactment. The regulations also were subject to an elaborate two stage congressional review process and a legislative veto.[4] Section 43(f); 49 U.S.C. app. § 1552(f).

On November 22, 1983, almost five years after the statutory deadline, DOL published final regulations ad-

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[3] If an air carrier experienced a severe work force contraction or bankruptcy as a result of the Deregulation Act, its furloughed or terminated "protected employees" were entitled to monthly assistance payments and other monetary benefits from the federal government. *See* Section 43(a), (b), (c); 49 U.S.C. app. § 1552(a), (b), (c). DOL was to publish guidelines establishing the amount of assistance payments for various employment categories. 49 U.S.C. app. § 1552(b) (1).

[4] Proposed regulations were to be submitted to the aviation committees of each House for thirty legislative days, and final regulations were to be submitted to each House for sixty legislative days, during which period they were subject to a one-House veto. These provisions had little impact, however, since the proposed regulations at issue were not submitted to Congress until after legislative veto provisions were declared unconstitutional in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

dressing only the duty to hire portions of the EPP. 48 Fed. Reg. 52,854 (1983). Guidelines establishing the government compensation aspect of the program have never been issued. The duty to hire regulations were later reissued with minor changes and initially became effective on January 27, 1986. 50 Fed. Reg. 53,094 (1985).

As specified in Section 43, DOL's regulations imposed the hiring duty only on carriers certificated prior to October 24, 1978 ("covered carriers"). By the time the regulations were promulgated, however, less than one-half of the certificated air carriers then operating were subject to the hiring duty. For the most part, these were the larger carriers, although much of the hiring was being done by their new competitors, which the statute exempts from the hiring requirements.[5] Significantly, although Section 43 *permits* covered carriers to recall first their own furloughed employees, it *requires* covered carriers to grant hiring preferences *only* to employees furloughed by *other airlines*. *See* 49 U.S.C. app. § 1552 (d) (1) (granting a protected employee furloughed by an air carrier a hiring right at "any *other* air carrier," which "*shall* have a duty to hire such a person"; hiring carrier first "*may* recall" its own furloughed employees) (emphasis added). Thus, the hiring duty is imposed exclusively on airlines that have had no previous employment relationship whatsoever with the "protected" applicants.

In addition, although the undisputed purpose of Section 43 was to protect employees adversely affected by deregulation, DOL created a preferred class of "designated employees" which includes employees terminated for reasons totally unrelated to deregulation, even if they are

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[5] Today, as a result of further restructuring and consolidation in the industry, the hiring duty is imposed on some air carriers but not others, and on some airline divisions or subsidiaries but not others under the same management. For example, American Airlines is covered but its sister subsidiary, AirCal, is not. USAir is covered, but its sister subsidiary, PSA, is not.

working for another airline when they apply. *See* 50 Fed. Reg. 53,094, 53,102.

In the legislative veto case last Term, this Court stated that the DOL regulations are "ancillary" in nature. *Alaska Airlines*, 107 S. Ct. at 1482-83. But when the regulations became effective more than seven years after the Deregulation Act, their impact was far more than "ancillary." They not only imposed a substantial burden on one segment of the industry at a time of intense competition but they created new obligations not specified in the statute, and required the retroactive identification and notification of "designated employees," providing them with incentives to assert Section 43 hiring preferences.[6]

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[6] The regulations, *inter alia*,

a. create a nationwide hiring pool of "designated employees" who have been terminated or furloughed since 1978 for any reason other than cause and thus are eligible to exercise hiring preferences at any covered carrier.

b. impose a mandatory obligation to hire minimally qualified "designated employees" for any job vacancies (*e.g.*, pilots, accountants, secretaries) over other better qualified job applicants, *see* 50 Fed. Reg. 53,102-03 (§ 220.11), even "designated employees" who have been furloughed because an airline ceases operating during a prolonged strike. *See* 50 Fed. Reg. 53,102 (§ 220.10).

c. require covered carriers to wait at least thirty days before filling any job vacancy with an applicant who is not a "designated employee," regardless of whether any designated employee has applied or is available and without any exception for safety-related positions that must be filled immediately. *See* 50 Fed. Reg. 53,103 (§ 220.24).

d. expressly prohibit covered carriers from applying to such "designated employees" safety-related initial hiring age requirements with which all other applicants must comply. *See id.* (§ 220.21(a)(1)).

e. override most affirmative action and other legal hiring duties imposed on the airlines by federal statute. *See* 50 Fed. Reg. 53,102-04 (§§ 220.10, .11, .20, .23(j), .29).

f. establish a variety of extensive retroactive notification and reporting requirements. *See* 50 Fed. Reg. 53,103-04 (§§ 220.22, .23, .25, .27, .28).

B. Proceedings Below.

In February 1984, petitioners brought this action against DOL in the district court and on March 9, 1984, filed a motion for summary judgment. DOL and several labor union intervenors [7] then filed cross-motions for summary disposition. On May 18, 1984, the district court (Judge Gesell) declared Section 43 unconstitutional in its entirety because it contained an inseverable legislative veto provision. *Alaska Airlines, Inc. v. Donovan*, 594 F. Supp. 92 (D.D.C. 1984). But on July 16, 1985, the United States Court of Appeals for the District of Columbia Circuit reversed, *Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550 (D.C. Cir. 1985), remanding the case to the district court for consideration of the remaining issues.

On March 3, 1986, certiorari was granted on the legislative veto issue, the only issue ripe for Supreme Court review. *Alaska Airlines, Inc. v. Brock*, 106 S. Ct. 1259 (1986). On March 25, 1987, this Court held that the unconstitutional legislative veto provision in Section 43 is severable from the rest of the EPP. *Alaska Airlines*, 107 S. Ct. at 1480.

On remand, the district court decided the remaining issues on January 22, 1986, invalidating one safety-related provision, but otherwise upholding the statute and the regulations. *Alaska Airlines, Inc. v. Brock*, 632 F. Supp. 178, 184 (D.D.C. 1986). On January 30, 1987, the United States Court of Appeals for the District of Columbia Circuit upheld Section 43 and the DOL regulations in their entirety.[8] *Alaska Airlines, Inc. v. Brock*,

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[7] Intervenors are Air Line Pilots Association, International; Association of Flight Attendants; Brotherhood of Railway and Airline Clerks; Flight Engineers' International Association; International Association of Machinists and Aerospace Workers; and Transport Workers Union of America.

[8] The court below affirmed the district court in all but two respects. In a brief memorandum opinion, the court reversed the district court's decision invalidating and remanding one safety-related regulation which prohibited airlines from applying initial hiring age policies to pilot and flight crew applicants, and also

Nos. 86-5042, 86-5085, & 86-5719 (D.C. Cir. Jan. 30, 1987). The airlines' petition for rehearing and suggestion for rehearing en banc were denied on March 9, 1987.[9]

REASONS FOR GRANTING THE WRIT

As construed by DOL, Section 43's grant of broad hiring preferences to a limited class of airline employees and the imposition on certain airlines, but not others, of a duty to hire the former employees of their competitors raises fundamental questions of constitutional law and statutory interpretation.

The means chosen by Congress for allocating the hiring burden violate principles of equal protection and just compensation for a government taking embodied in the Fifth Amendment. Section 43 imposes the burden *exclusively* on carriers that have no previous relationship whatsoever with the protected applicants and *disproportionately* on carriers that have avoided layoffs and therefore have not contributed to any employment dislocation. The hiring burden is not imposed as a condition of any government approval or benefit, and it is *not* even imposed on the former air carrier employer of the "protected employee." Nor is the burden imposed on any of the post-1978 carriers, even though they have created many new jobs and, as fierce competitors of the covered carriers, have contributed to employment dislocation. Particularly since the hiring duty is not limited to employees affected by deregulation, but has been expanded by DOL to include employees furloughed as a result of recent, intervening events, such as the air traffic controllers' strike, there is no rational basis for the substantial com-

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vacated a portion of the district court's decision which attempted to reconcile a conflict between the airlines' equal employment opportunity requirements and their duty to hire.

[9] The Chief Justice granted an extension until July 7, 1987, in which to file a petition for a writ of certiorari.

petitive disadvantage created by Section 43's discrimination against certain pre-1978 carriers. Moreover, imposing the hiring burden exclusively on these carriers without prior notice, and thus relieving the responsible carrier and the government of their financial obligations violates the takings clause because the hiring carrier incurs substantial costs that are not related in any way to its obligation to its own former employees. Nor does the hiring carrier bear any responsibility for the employee's dislocation or receive any benefit from the government.

Further, the hiring preference scheme is not a rational means of achieving Congress' articulated purpose—to protect employees adversely affected by deregulation. Nor is it rationally related to any legitimate governmental interest because (1) by benefitting primarily employees who were furloughed for reasons unrelated to deregulation (even those currently employed at other airlines) the hiring scheme frustrates the legislative objective by making it more difficult for employees adversely affected by deregulation to find jobs; and (2) the establishment of a generalized, industry-wide regulatory hiring program, creating a preferential class of employees based solely on seniority, is no more reasonable than distinctions based on past residence, sex or economic status and is contrary to the deregulatory purpose of the statute.

The court below failed to address these issues and to provide a reasoned basis for its decision consistent with this Court's standards for due process and equal protection analysis. These issues are important to the airlines, affecting the heart of their operations, *i.e.*, safety, competition, affirmative action and other employment policies, and they warrant full review by this Court.

I. BY IMPOSING THE HIRING DUTY ONLY ON AIR CARRIERS THAT HAVE HAD NO PREVIOUS RELATIONSHIP WITH PROTECTED APPLICANTS, AND BY EXEMPTING OVER HALF OF THEIR COMPETITORS, THE HIRING PREFERENCE SCHEME VIOLATES PRINCIPLES OF THE FIFTH AMENDMENT SET FORTH BY THIS COURT.

Petitioners challenge the constitutionality of both the duty to hire provisions of Section 43(d) and DOL's implementing regulations. Under due process requirements, governmental discrimination among similarly situated persons is invalid unless it is "rationally related to a legitimate governmental interest." *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). Petitioners recognize that since this case does not involve a constitutionally suspect classification, the standard of judicial review is rigorous. But the legislature does not have *carte blanche* authority.

This Court does not automatically defer to any conceivable public interest articulated by the government or its counsel. *Cleburne*, 473 U.S. at 447-50; *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 188 (1980) (Brennan, J., dissenting). By accepting summarily the government's *post hoc* rationale without reasoned analysis, the court below failed to recognize that in "practical operation" the means chosen by Congress are not rationally related to a legitimate governmental interest. *See Moreno*, 413 U.S. at 538; *Cleburne*, 473 U.S. at 446-47; *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 875, 878-79 (1985).

A. The Means Chosen To Implement The Hiring Preference Violate The Takings Clause And Equal Protection Concepts Embodied In The Fifth Amendment.

The duty to hire program is a complete departure from the statutory labor protections previously upheld by this Court. *See, e.g., United States v. Lowden*, 308 U.S. 225 (1939) (upholding against constitutional challenge labor

protections for employees of a specific carrier which are imposed on that carrier as a condition of government approval of an action that may adversely affect its employees). Here, an entire class of carriers (*i.e.*, the covered carriers) has a duty to hire employees with whom the carriers have had no previous employment relationship. These obligations are not triggered by any government approval or carrier action authorized by the government; they are not connected to any regulated event. Covered carriers are required to grant a hiring preference to employees terminated or furloughed by their competitors for any reason other than cause (*e.g.*, a competitor's mismanagement, change in corporate strategy, labor dispute or cost reduction program).[10]

The primary burden of the hiring program is on carriers that have sought to maintain employment stability during the transition to deregulation (and thus have no furloughed employees of their own to recall). After hiring and training "protected employees," in place of other more qualified applicants whom they must reject, the covered carriers then face the reality that "protected employees" can be recalled by their former employers (and indeed they have an incentive to return to former jobs where they have accrued seniority and higher compensation), leaving the covered carriers without needed pilots, mechanics, and other skilled personnel.

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[10] In Section 43, Congress was proposing for the first time an unemployment insurance plan coupled with a system of enormous employee re-hire rights that addressed not just "individual firms or individual employees, but rather, the general regulatory structure [encompassing] all of the areas and all the workers in the industry." *Regulatory Reform in Air Transportation: Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, Transportation*, 95th Cong., 1st Sess. 709 (1977) ("Senate Hearings") (statement of Robert E. Ginther, Committee staff member). *See also* Senate Report at 208 (Additional Views of Sen. Zorinsky) (characterizing Section 43 as "new and without precedent").

By imposing the hiring duty on carriers with no prior relationship with the protected employee, and no responsibility for the employment dislocation, Section 43 transfers to those carriers obligations that should have been incurred by their competitors who were responsible for the employees' termination. It further relieves the government of its financial assistance obligations, mandated by Section 43 but never implemented. The hiring duty imposes actual, measurable costs on the hiring carrier which include the payment of salaries and benefits to employees who are less qualified and able than other applicants who must be rejected and the cost of training and retraining that can be amortized over fewer years or lost altogether if the protected employee returns to his former employer.[11] Imposition of these costs on carriers which bear no responsibility for the dislocation, and had no notice that they would assume such obligations by virtue of their participation in the airline industry, constitutes a taking of property without just compensation. *Connolly v. Pension Benefit Guaranty Corp.*, 106 S. Ct. 1018, 1026-27 (1986) (upholding against "taking" challenge the withdrawal liability provisions of pension law because liability "directly depends on the relationship between the employer and the plan to which he made contributions" and because employers had "more than sufficient notice"); *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (unlawful taking if regulation "forces some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). *See also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1258-59 (1987) (Rehnquist, C.J., dissenting); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

The failure of the EPP to apportion the costs of the duty to hire program reasonably and equitably among the

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[11] *See* Affidavit of Dolores E. Wallace, Sr. Director, Selection and Field Personnel Administration for American Airlines, accompanying motion for summary judgment below, at ¶ 28 (initial pilot training exceeds $12,000 per trainee).

air carriers in relation to their responsibility to the "protected employees" clearly distinguishes this case from instances in which Congress has required a business to assume obligations relating to its own employees, or to the employees of a company it acquires. *See United States v. Lowden*, 308 U.S. at 240 (railroad required to pay part of the benefit it received to compensate the "loss to employees occasioned by the exercise of the privilege").

In its summary disposition of these issues, the court below cites *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), without any explanation. App. A (4a). That decision, however, demonstrates why Section 43 fails the rational basis test. In *Elkhorn*, this Court upheld a statute that imposed on coal mine operators certain costs for black lung disease (pneumoconiosis) of their own former employees. The Court concluded that "the Due Process Clause poses no bar to requiring an operator to provide compensation for a former employee's death or disability due to pneumoconiosis arising out of employment in its mines . . . ." *Id.* at 19-20. Under such circumstances, the statute "serves to spread the costs in a rational manner—by allocating to the operator an actual cost of his business, the avoidance of which might be thought to have enlarged the operator's profits." *Id.* at 24-25.[12]

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[12] The Court in *Elkhorn* was careful to show a rational connection between burdens placed on an operator and his responsibility to the employees. One provision of the statute created an "irrebuttable presumption" that a former employee died of pneumoconiosis if there was clinical evidence of the disease, regardless of the actual cause of death. The Court noted that "[t]he damage resulting from a miner's death that is due to causes other than the operator's conduct can hardly be termed a 'cost' of the operator's business." *Id.* at 25. But the Court found that the Act also intended to compensate for injury to health and thus this statutory provision "authorizes compensation for injury attributable to the operator's business." *Id.* at 25. The Court also was concerned that another statutory provision appeared "to preclude an operator's defense that the disease did not arise out of employment in the particular mines for which it was responsible." *Id.* at 35. The district court had held that provision unconstitutional, but this Court avoided the constitutional question by construing the provi-

Here, in contrast, the hiring burden is imposed exclusively on companies with no previous relationship to the protected employee whatsoever, and the one carrier with a specific connection to the former employee, which was responsible for his termination, escapes the burden altogether. Such a scheme offends equal protection standards embodied in the due process clause.[13] *Cf. National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway*, 470 U.S. 451, 477-78 (1985) (cost-sharing scheme allocates to railroad only the costs attributable to its present and former employees).

Further, the EPP discriminates between the pre-1978 and post-1978 carriers even though they compete directly with each other to provide airline service to the public.

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sion narrowly, determining that Congress did not intend that it apply to private operators. *Id.*

[13] The circumstances in this case are far more egregious than in *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 330 (1935). In *Alton Railroad*, the Court invalidated, on due process grounds, a provision in the Railroad Retirement Act providing for employer-financed pensions for former employees who, although not in the employ at the time of enactment, had been so employed within a year prior to passage. The Court found it "arbitrary in the last degree" to require carriers to provide benefits for employees who may have resigned or been dismissed for any reason whatsoever, and found this requirement unrelated to the legislative goal of increasing efficiency in the railroads. *Id.* at 349. The Court in *Alton* also found unconstitutional a requirement that if a former employee of any carrier is hired by another carrier, a railroad would be required to pay his pension based on his service with both railroads. The Court stated:

> The provision is not only retroactive in that it resurrects for new burdens transactions long since past and closed; but as to some of the railroad companies it constitutes a naked appropriation of private property upon the basis of transactions with which the owners of the property were never connected.

Id. at 349-50. This Court in *Elkhorn* was careful to distinguish *Alton Railroad*, pointing out that the black lung benefits were not simply provisions "to meet [a] generalized need for funds," but were intended to meet a specific need of a former employee created by the conditions under which he labored, which was a measurable cost of his former employer's doing business. 428 U.S. at 19.

The imposition of a hiring duty on only one part of the industry constitutes unfair discrimination because it is not rationally designed to achieve a legitimate governmental purpose. *See Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985). Without analysis, the court below accepted the government's justification for this discrimination (*i.e.*, that the pre-deregulation carriers should bear the entire burden of providing for dislocations caused by deregulation), App. A (4a), even though Congress said that the "public" and not a particular segment of it should bear the burden, *see* Senate Report at 114, and mandated a government financial assistance program that DOL has never implemented. *Cf. Elkhorn*, 428 U.S. at 40 n.5 (Powell, J., concurring).

The implication of the court below is that covered air carriers benefitted from the regulatory era and therefore should bear this newly created and *exclusive* burden of employment dislocations caused by deregulation. This assumption is not supported by the legislative history or experience. Congress recognized that the regulatory era did not result in substantial benefits to regulated air carriers. *See* Senate Report at 4. The industry earned, on average, a low rate of return compared to nonregulated industries, and at the time of deregulation air carriers were burdened with high costs and inefficiencies that resulted from the highly regulated structure.[14] Nor does the hiring preference scheme place the hiring burden on carriers that have contributed to employment dislocation. If Congress had really intended to impose the burden of employment dislocation on the responsible carriers, it would have required carriers to hire back their own former employees rather than those of their competitors.[15] And it would not have devised a scheme that

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[14] *See* Senate Hearings at 306-11 (prepared statement of James C. Miller, III) (estimating that the annual cost of regulation-imposed constraints on carriers was about $1 billion per year).

[15] In the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, § 27, 96 Stat. 1102, 1126 (codified at 49 U.S.C. § 10935 note (1982)), Congress required companies to hire back their own

allocated the burden disproportionately to carriers that have maintained employment stability. Nor would it have exempted the new entrants which have caused much of the dislocation and created many of the new jobs. *See Elkhorn*, 428 U.S. at 43-44 (Powell, J., concurring.)[16]

This discriminatory hiring preference program has had anomalous consequences. For example, Carriers A and B competed on a particular route before the Deregulation Act. As a result of deregulation, a low cost, low fare new Carrier C enters the market forcing Carrier A to abandon the route and lay-off employees. Under these circumstances, Carrier C has no hiring obligation with respect to Carrier A's employees, nor does Carrier A. Only Carrier B has a Section 43 duty to hire Carrier A's former employees. By imposing the hiring duty on only one segment of the industry the EPP creates a competitive handicap which is inconsistent with the primary purpose of the Deregulation Act to foster full and fair competition among air carriers on an even handed basis.[17] *See* 49 U.S.C. app. § 1302(a)(4); Senate Report at 1-5.

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former employees and only to consider the former employees of their competitors.

[16] The classification scheme here does not even comport with the rationale the government has devised in support of it. Midway Airlines, for example, is a covered carrier subject to the hiring duty because it was certificated just prior to enactment of the Deregulation Act, even though it did not begin operations until after deregulation. Yet, several of the large intrastate air carriers (*e.g.*, Southwest Airlines) are not covered carriers even though they were substantial employers prior to deregulation and, applying the government's logic, "benefitted" from the federal route and rate restrictions applied to their competitors during the regulatory era.

[17] Covered carriers already are encumbered by substantially higher labor costs generated during the regulatory period when higher costs were passed through in rate proceedings. *See Airline Mergers and Acquisitions: The Question of Labor Protection: Hearing Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science and Transportation*, 99th Cong., 1st Sess. 7 (1985) (statement of Matthew V. Scocozza, Asst. Secy. for Policy

The discriminatory burden facing the pre-1978 carriers results from Congress' attempt to establish responsibility on a retroactive basis to deal prospectively with circumstances created by deregulation. It is a pattern that has often troubled this Court. *See, e.g., Elkhorn*, 428 U.S. at 16-17; *id.* at 42-44 (Powell, J., concurring); *Zobel v. Williams*, 457 U.S. 55, 63 (1982). In *Zobel* the Court rejected the state of Alaska's attempt prospectively to reward past contributions based on past residency, concluding that distinctions based on intangible "past contributions" did not further a legitimate state purpose. *Id.* at 63. As Justice Brennan noted, "In almost all instances, the business of the State is not with the past, but with the present: to remedy continuing injustices, to fill current needs, to build on the present order to better the future. . . . Thus, the past-contribution rationale proves much too little to provide a rational predicate for discrimination . . . ." *Id.* at 70-71 (Brennan, J., concurring).

Since the hiring duty is not limited to employees terminated as a result of deregulation, there certainly is no rational justification for imposing only on pre-1978 carriers the duty to remedy new injuries caused by more recent events. Allocating such new burdens on a retroactive basis contravenes a long established principle of this Court.

B. The Duty To Hire Program Is Not Rationally Related To The Articulated Legislative Purpose.

This Court has stated that when a statute's purpose has been articulated, it is not necessary to "speculate as to the objectives of the legislature." *Zobel*, 457 U.S. at 61 n.7. The Court's function is to determine whether

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and Int'l Affairs, DOT) ("We have a completely different situation after 1978 now. We have some of our more traditional carriers, competing with post-deregulation carriers that have much, much lower costs, very different operating scenarios, and much different labor agreements"). *See also* Cappelli and Harris, *Airline Union Concessions in the Wake of Deregulation*, 108 Monthly Lab. Rev. 37, 37-38 (June 1985).

the statutory scheme "rationally furthers" the legitimate, articulated state purpose. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973).

It is beyond dispute here that Congress' express and sole purpose in enacting Section 43 was to provide protections for employees adversely affected by deregulation. The labor protections contained in both the final House and Senate bills were provided only for employees affected by deregulation. *See* H.R. 12611, 95th Cong., 2d Sess. § 32 (1978) ("No authority granted by this Act . . . shall be exercised by any carrier unless prior to each such exercise, [DOL] has certified . . . that the interests of the employees *who may be affected thereby* have been adequately protected . . . .") (emphasis added); *see also* S. 2493, 95th Cong., 2d Sess. § 22(h)(2) (1978) (financial benefits and hiring preferences accorded only to employees of carriers suffering bankruptcy or workforce reduction *caused by a "change in regulatory structure"* provided by the Deregulation Act). The committee reports of each house and the floor debates, prior to and subsequent to the House-Senate Conference Report, overwhelmingly confirm that Congress' sole intention was to protect employees adversely affected by deregulation. *See infra* at 24-25. The legislative history further makes clear that Congress intended one integrated, interrelated EPP, consisting of financial benefits and a hiring preference and that Congress wanted the program initiated immediately to ease the transition to deregulation. *See* Senate Report at 116.

DOL's regulatory program, however, completely departs from Congress' articulated purpose in several crucial respects. First, as noted above, DOL's delay of five years in promulgating its regulations is contrary to the legislative purpose. In fact, DOL was without authority to thrust this new regulatory burden on one segment of the industry at the time it did, since Section 43 requires that any regulations be issued within six months after

October 24, 1978.[18] By the time the regulations were promulgated, thousands of employees had changed jobs, earning "protected employee" status, and many of them were working for competitors of their former employers, including dozens of new entrant air carriers. By providing for retroactive notification of "designated employees," DOL imposed a program "dictated by historical patterns that may be wholly unrelated to the present contours of the industry." *Elkhorn*, 428 U.S. at 43 (Powell, J., concurring). The hiring duty regulations, for example, were imposed on fewer than half of the certificated carriers operating in 1986.

Second, DOL neglects altogether the government's compensation obligations. In the EPP's integrated design, which originated in the Senate bill, the hiring preference was intended to constrain the demand for federal funding. *See* Senate Report at 116 (emphasizing the "interaction" between the two program segments). Congress expressly required that the compensation program be established expeditiously, 49 U.S.C. app. § 1552 (f)(2), but DOL ignored this mandate and instead implemented only the duty to hire provisions, thrusting the entire new burden imposed by the EPP on the covered air carriers.

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[18] Applying its technical reading of the statute consistently, *see infra* at 25-26, DOL should have recognized that its authority to issue duty to hire regulations had expired long before 1984. Section 43(f)(1) states that "[t]he Secretary *may* issue . . . such . . . regulations as may be necessary for the administration of this section," but subsection (2) states that "rules or regulations which the Secretary deems necessary . . . *shall* be promulgated within six months after October 24, 1978." (emphasis added). Reading the clauses together, it is apparent that DOL's permissive authority expired at the end of six months. Such a reading is consistent with the objective of the EPP which was to ease the transition into deregulation. Thrusting a comprehensive, new regulatory program on the industry five years later would have been inconsistent with the deregulatory purpose of the Act. *See, e.g.*, 49 U.S.C. app. § 1302(a)(4) ("maximum reliance on competitive market forces"); *id.*, § 1302(a)(3) (no "unjust discriminations, undue preferences or advantages"); Senate Report at 5.

Third, despite Congress' articulated purpose to help employees adversely affected by the Deregulation Act, DOL's hiring preference program benefits primarily persons whose dislocations are not attributable to deregulation.[19] Because DOL's regulations are so overinclusive they actually frustrate the statutory purpose by greatly expanding the hiring pool and thereby diluting the job opportunities available to those whom Congress intended to protect (*i.e.*, employees who lose their jobs because of deregulation).[20]

DOL made no attempt to tailor its program or to establish a nexus between the hiring burden and the injury Congress intended to remedy. For example, Congress or DOL could have established a rebuttable presumption that protected employees were adversely affected by deregulation, allocating to the carriers the burden to show they are not. In *Elkhorn*, this Court scrutinized several statutorily created presumptions under due process analysis to ensure that they did not break the rational connection between the injury Congress intended to repair and the burden placed on the responsible employer. *Elkhorn*, 428 U.S. at 20-37. The statute cre-

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[19] In the eight years since the Deregulation Act, many intervening events have resulted in employment dislocation. DOL's retroactive notification provisions require the covered carriers to search out and certify as "designated employees" persons who had been terminated or furloughed since 1978 because, *inter alia*, (a) a foreign government closes an international facility, (b) flights are reduced as a result of the government's firing of the air traffic controllers in 1981, (c) a labor strike causes an airline to suspend service temporarily, (d) federal safety enforcement grounds certain aircraft, or (e) an economic recession curtails service.

[20] At the time DOL issued its final regulations, the expert agencies, DOT and CAB, had concluded that almost all employment dislocations since 1978 were attributable to causes other than deregulation. *See In re Application of Employees of Aeroamerica*, Dkt. No. 38,885 (CAB Apr. 7, 1983), CAB Order 83-4-36, at 7-10; Comments of the Department of Transportation, Sept. 3, 1982 in *id.* Thus, the hiring preference program established by DOL's regulations imposes a significantly greater burden on covered carriers than Congress intended.

ated a rebuttable presumption that a coal miner with ten years employment in the mines who suffered from pneumoconiosis contracted his disease from his employment. The presumption was found constitutionally valid because it "simply . . . shift[ed] the burden of going forward with evidence from the claimant to the operator," and because the ten year period was supported by scientific evidence presented in testimony by the Surgeon General to Congress. *Id.* at 27.

In contrast, Section 43, as construed by DOL, creates no presumptions but establishes an absolute, irrebuttable, generalized hiring duty without reference to the harm Congress intended to remedy—unemployment caused by deregulation.[21] *Compare Elkhorn*, 428 U.S. at 19.

Thus, the legislative scheme is both overinclusive and underinclusive. The hiring *right* benefits primarily employees who are terminated for reasons unrelated to deregulation, but the hiring *duty* applies only to interstate carriers certificated prior to deregulation. In "practical operation," some air carriers, but not all of them, have a duty to hire some—but not all—of the employees displaced by the air traffic controllers' strike. Some—but not all—nonstriking employees furloughed when their carrier is grounded because of a strike may exercise hiring rights at some—but not all—of the striking carrier's competitors. *Cf. South Dakota v. Dole*, 55 U.S.L.W. 4971, 4974 (U.S. June 23, 1987) (O'Conner, J., dissenting). It is difficult to conceive of a classification scheme more "clearly irrelevant" to the stated purpose of the Deregulation Act and Section 43.

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[21] This Court has invalidated such statutory classifications based on irrebuttable statutory presumptions (*e.g.*, that all terminations are attributable to deregulation), in circumstances where individualized decisionmaking or a rebuttable presumption would have achieved the legislative purpose. *Cf. Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973); and *Vlandis v. Kline*, 412 U.S. 441 (1973).

Because the means chosen in Section 43 are not rationally related to the *articulated* legislative purpose, the hiring preference scheme is invalid under the due process clause. *See Zobel*, 457 U.S. at 61; *McGinnis v. Royster*, 410 U.S. 263, 270 (1973); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314 (1976); *United States Railroad Retirement Board v. Fritz*, 449 U.S. at 188 (Brennan, J., dissenting).

C. The Hiring Preference Scheme Is Not Rationally Related To Any Legitimate Government Interest.

The hiring preference scheme not only fails to further the congressionally articulated purpose, it is not rationally connected to any conceivable, legitimate government interest. The EPP singles out a special class of employees who happen to have accumulated four years of seniority at a single covered air carrier as of October 24, 1978, and who happen to have been furloughed during a ten year period for any reason at all (except cause) even if they are currently employed by an airline. Such employees are entitled to a hiring preference over more qualified applicants, most beneficiaries of EEO and other federal statutory programs, and even applicants adversely affected by deregulation without the requisite four years at a single carrier. The hiring duty further conflicts with the air carriers' primary statutory duty "to perform their services with the *highest possible* degree of safety," 49 U.S.C. app. § 1421(b) (emphasis added) (*see also* §§ 1307(a), 1303(a)), by forcing them to choose less qualified applicants for safety-related positions and to ignore safety-related initial hiring age policies.[22] Severed from any connection to deregulation, an industry-wide hiring preference based on seniority at a

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[22] *See Murnane v. American Airlines, Inc.*, 667 F.2d 98, 101 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); *see also Harriss v. Pan American World Airways, Inc.*, 437 F. Supp. 413, 434 (N.D. Cal. 1977), *aff'd in relevant part*, 649 F.2d 670 (9th Cir. 1980); *Spurlock v. United Airlines, Inc.*, 475 F.2d 216, 219 (10th Cir. 1972) ("[t]he public interest clearly lies in having the most highly qualified persons available to pilot airliners").

particular cut-off date does not serve a legitimate government interest any more than a distinction based on date of birth, color of hair, years of residence, race or sex.

In *Moreno*, this Court addressed a statutory classification scheme under which households with unrelated persons were excluded from the Food Stamp Program. The Court first held that the classification was not rationally related to the articulated legislative purpose of the Food Stamp Act—to help the nation's agricultural economy and satisfy nutritional needs. 413 U.S. at 533-34. The Court then examined whether the challenged classification would "rationally further some legitimate governmental interest other than those specifically stated" by Congress. *Id.* at 534. Rejecting the government's argument that the classification would prevent fraud, the Court noted that other statutory provisions dealt directly with fraud and that "in practical effect, the challenged classification simply does not operate so as rationally to further the prevention of fraud." *Id.* at 537. Arguably, the exclusion of unrelated persons would eliminate some fraud just as the hiring duty may pick up some employees adversely affected by deregulation, but these blunt instruments are so overinclusive that they simply are not rationally related to a legitimate governmental purpose.

The government's counsel suggested below that Congress may have wanted to provide generalized protections for airline employees who had made a significant work commitment during the regulatory era in reliance on the security of regulation. Brief for Federal Appellees, at 39, *Alaska Airlines, Inc. v. Brock*, Nos. 86-5042 and 86-5085 (D.C. Cir. Jan. 30, 1987). Congress could have done this through a financial assistance program, but it mandated financial assistance only for employees adversely affected by deregulation, and DOL, of course, has ignored this mandate. Imposing such a general obligation inequitably on certain covered air carriers, which have had no previous employment relationship with the protected employees, however, is not a rational means of achieving such an objective. *See Elkhorn*, 428 U.S. at 19.

Simply because some *post hoc* rationale can be articulated to advance a governmental interest does not establish that a discriminatory classification scheme is rational. *See Moreno*, 413 U.S. at 538; *Cleburne*, 473 U.S. at 448-50 (concern about flooding and overcrowding did not justify excluding home for mentally retarded from neighborhood since such concerns applied equally to other homes not subject to exclusion); *Metropolitan Life*, 470 U.S. at 822 (invalidating Alabama statute that purported to encourage new capital investment by taxing out of state insurance companies more heavily than Alabama companies because in "practical operation" the statute's discrimination against nonresident competitors did not serve "a legitimate state purpose.") In practical operation, Section 43 does not rationally further any legitimate governmental interest.

II. DOL'S INTERPRETATION THAT SECTION 43 IMPOSES A DUTY TO HIRE EMPLOYEES TERMINATED FOR REASONS UNRELATED TO DEREGULATION CONTRAVENES THIS COURT'S PRECEDENT REQUIRING THAT REGULATIONS BE CONSISTENT WITH THE DESIGN, ORIGIN AND PURPOSE OF A STATUTE.

Congress included Section 43 in the Deregulation Act in 1978 to assist employees who might be adversely affected by the transition to deregulation. *See infra* at 24-26. In light of Congress' clearly articulated purpose, the circuit court's affirmance of DOL's wooden reading of the statute to extend the hiring duty to persons terminated for reasons unrelated to deregulation and even to persons working for other airlines is contrary to the guidelines of this Court on statutory interpretation. Those guidelines emphasize that regulations must be in harmony with the purpose of the authorizing legislation. An agency cannot rely on a technical reading of the statute if such a construction is contrary to congressional intent. This Court has

> rejected the suggestion that a regulation is to be sustained simply because it is not "technically inconsistent" with the statutory language, when that

> regulation is *fundamentally at odds with the manifest congressional design.* . . . The challenged Regulation is not a reasonable statutory interpretation unless it *harmonizes with the statute's "origin and purpose."*

United States v. Vogel Fertilizer Co., 455 U.S. 16, 26 (1982) (quoting *National Muffler Dealers Association, Inc. v. United States*, 440 U.S. 472, 477 (1979)) (citations omitted and emphasis added). *See also Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261, 272 (1968) (quoting *NLRB v. Brown*, 380 U.S. 278, 291 (1965)); *FBI v. Abramson*, 456 U.S. 615, 625 n.7 (1982) (quoting *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part)).[23]

The court below failed to apply these standards to determine whether DOL's regulations are consistent with congressional intent. Congress enacted Section 43 as an "insurance" policy against the "theoretical possibility" of employment reductions resulting from the Deregulation Act. 124 Cong. Rec. S5879 (daily ed. Apr. 19, 1978) (statement of Sen. Cannon); Senate Report at 113 (protection provided against "employee dislocations that might occur *as a result of the new regulatory structure*" (emphasis added)). The final bills introduced in both houses expressly provided protections only for employees affected by deregulation. *See supra* at 17. The House bill, H.R. 12611, authorized benefits similar to those previously provided to employees affected by governmental action in other areas of transportation. H.R. 12611, 95th Cong., 2d Sess. § 32 (1978).[24]

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[23] *See also Rose v. Lundy*, 455 U.S. 509, 517 (1982) (court "must analyze the policies underlying the statutory provision to determine its proper scope"); *Stafford v. Briggs*, 444 U.S. 527, 535 (1980) (citation omitted) (" 'in interpreting a statute, the court will not look merely to a particular clause . . . but will take in connection with it the whole statute . . . and the objects and policy of the law' ").

[24] The benefits authorized in H.R. 12611 were based upon those established in section 5(2)(f) of the Interstate Commerce Act

The bill passed by the Senate contained an entirely different concept of employee protection, but it also limited the benefits to persons affected by deregulation. The hiring preference was limited to employees terminated by carriers that had gone bankrupt or suffered a 15 percent workforce reduction caused by the Deregulation Act, as determined by the CAB. *See* S. 2493, 95th Cong., 2d Sess. § 22 (1978); *see* 124 Cong. Rec. S5876-83 (daily ed. Apr. 19, 1978) (hiring right available only to employees terminated as a consequence of deregulation). Thus, although the House and Senate versions of employee protection were significantly different, when the two bills went to conference they shared one common limitation—they expressly applied only to individuals adversely affected by the Deregulation Act.

The Conference Committee in essence adopted the Senate version, with two substantive modifications. First, the Committee lowered the 15 percent threshold for a workforce reduction caused by deregulation to 7.5 percent. H.R. Rep. No. 1779, 95th Cong., 2d Sess. 105 (1978). Second, it deleted as a prerequisite for a terminated employee's exercise of a hiring right the requirement that the CAB determine after a formal hearing whether his employer had gone bankrupt or suffered a substantial workforce reduction. *Id.*

The Conference Committee did not explain the reason for the deletion but it is logical to infer that Congress intended that all employees terminated as a result of deregulation be eligible and not simply those whose employers were most severely affected (*e.g.*, bankrupt carriers). Nonetheless, DOL seized upon the deletion of this

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and section 405 of the Rail Passenger Service Act. In both of those statutes, benefits were provided only to employees who were adversely affected by governmental action. *See* 49 U.S.C. § 11347 (1982) (protective arrangements for employees terminated as a result of railroad mergers approved by the Interstate Commerce Commission); 45 U.S.C. § 565 (1982) (protection for railroad employees adversely affected by discontinuance of passenger route authorized by statute).

requirement as its sole justification for concluding that its authority to confer first-hire rights went beyond employees affected by deregulation. *See* 50 Fed. Reg. 53,094-95 (1985). DOL's mechanical interpretation completely ignores the manifest purpose of Section 43 and both the House and Senate bills that preceded it. There is no indication that either the House or the Senate ever intended to extend the protection to employees furloughed for reasons completely unrelated to deregulation.[25]

The error of DOL's interpretation is further demonstrated by the statements Conference Committee members made when reporting to their respective Houses. They made clear that the purpose of the bill—despite the changed language—was only to protect employees who lost their jobs *"as a consequence of the deregulation bill."* 124 Cong. Rec. H13,445 (daily ed. Oct. 14, 1978) (remarks of Rep. Anderson, Chairman of the House Aviation Subcommittee) (emphasis added).[26]

Given the limited scope of the House and Senate bills, which addressed specifically the consequences of the Deregulation Act on employment, it is unthinkable that, without any debate or discussion, Congress would have intended to expand Section 43(d) dramatically to provide a generalized hiring preference for employees furloughed for reasons unrelated to the purposes of the

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[25] Under the rules of the House and Senate, the Conference Committee had no authority to delete the requirement in both bills that benefits be provided only to employees adversely affected by deregulation. *See* Jefferson's Manual and Rules of the House of Representatives, H.R. Doc. No. 277, 98th Cong., 2d Sess. 641 (1985) (Rule XXVIII); Senate Manual, S. Doc. No. 1, 98th Cong., 2d Sess. 59 (1984) (Rule XXVIII).

[26] *See also* 124 Cong. Rec. H13,445 (remarks of Rep. Snyder, ranking minority member of the House Aviation Subcommittee); *id.* at H13,447 (remarks of Rep. Johnson, Chairman of the House Public Works and Transportation Committee); 124 Cong. Rec. S18,796 (daily ed. Oct. 14, 1978) (remarks of Sen. Cannon, Chairman of the Senate Commerce, Science and Transportation Committee); *id.* at S18,800 (remarks of Sen. Stevenson, Chairman of the Senate Aviation Subcommittee).

Deregulation Act. To infer that the Conference Committee created out of whole cloth such an intrusive and unprecedented regulatory program in legislation otherwise dedicated to deregulating the industry simply defies common sense.[27]

At a minimum, DOL should have considered the constitutional issues raised by the airlines during the rulemaking and tailored its program to meet the articulated congressional purpose and to avoid due process and equal protection violations. *See Greene v. McElroy*, 360 U.S. 474, 507 (1959); *NLRB v. Catholic Bishops of Chicago*, 440 U.S. 490, 507 (1979).

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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July 7, 1987

[27] For example, in a case now pending in a federal district court, a purported class of some 3,000 flight attendants who struck petitioner Trans World Airlines in 1986 and were permanently replaced, have sued TWA for over $80 million in damages, for failing to issue notices which would evidence their first right of hire as flight attendants with other airlines. *See Long v. Trans World Airlines, Inc.*, No. 86 C 7521 (N.D. Ill.). Although these employees left TWA's active payroll as a result of a labor dispute eight years after deregulation, the Department of Labor opined that they are entitled to hiring preferences under the EPP. The plaintiffs have also threatened to sue other carriers, including several petitioners herein, who have not hired them. It is inconceivable that Congress intended the airline employee protection program to apply in such circumstances.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 86-5042, 86-5085 & 86-5719

ALASKA AIRLINES, INC., *et al.*,
Appellants

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*

Argued January 13, 1987

Decided January 30, 1987

Appeals from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 84-0485)

Before: EDWARDS, BUCKLEY and D.H. GINSBURG, Circuit Judges.

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were briefed and argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by

the Court. *See* Local Rule 13(c). On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in Nos. 86-5042 and 86-5085 is hereby affirmed in part, reversed in part, and vacated and remanded in part for the reasons set forth in the accompanying memorandum. It is

FURTHER ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in No. 86-5719 is affirmed insofar as it denies a Rule 60(b) motion for relief from judgment for the reasons set forth in the accompanying memorandum; and that, in light of the disposition in Nos. 86-5042 and 86-5085, the appeal is dismissed as moot insofar as the motion requested enforcement of a prior judgment or review of subsequent agency action. It is

FURTHER ORDERED, by this Court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam

For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

MEMORANDUM

In the District Court, the appellants, Alaska Airlines and fourteen other airlines (the "Airlines"), raised a number of challenges to regulations promulgated by the Secretary of Labor (the "Secretary") pursuant to his statutory authority under section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. § 1552 (1982) (the "Act"). Section 43 delineates the Act's "employee protection program," one provision of which imposes on previously-regulated air carriers the duty to give a hiring preference to certain airline employees (hereinafter "protected employees") who are terminated or furloughed by such carriers within the ten-year period commencing October 24, 1978. 49 U.S.C. § 1552(d)(1) (1982). Section 43 authorizes the Secretary to "issue, amend, and repeal such rules and regulations as may be necessary" to administer this program. *Id.* § 1552(f)(1). Following notice and comment, the Secretary promulgated the regulations in question. Airline Employees Protection Program, 50 Fed. Reg. 53,093 (1985) (to be codified at 29 C.F.R. pt. 220.)

The appellants argue that the Secretary's rules are inconsistent with the Act, violate the carriers' Fifth Amendment rights, and fail to reconcile the requirements of the employee protection program with the carriers' safety and civil rights obligations. The District Court rejected all but one of these challenges.

In all respects save one, we find that the regulations are clearly reasonable, consistent with the terms of the Act, and within the Secretary's statutory authority. Accordingly, under the standard of review dictated by the Administrative Procedure Act, 5 U.S.C. § 706(2) (1982), we uphold all but one portion of the challenged regulations as a lawful exercise of the Secretary's statutory authority.

The Airlines' challenge to the statute and regulations on Fifth Amendment grounds is also without merit. Con-

gress' decision to place certain of the burdens of airline deregulation solely on the previously-regulated carriers satisfies the standard of rationality that applies to economic regulation. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1509-11 (D.C. Cir. 1984).

Accordingly, we affirm the judgment of the District Court except as indicated below.

We uphold the Secretary, and thus reverse the District Court, on the issue that is the subject of the Air Line Pilots Association's cross-appeal. We hold that the District Court erred in invalidating and remanding 29 C.F.R. § 220.21(a)(1) to the Secretary with instructions to consider the carriers' safety concerns. The regulation in question specifies that the carriers' duty to hire protected employees precludes the application of an employer's maximum hiring age criteria (except with respect to retirement ages) to job candidates who qualify for the hiring preference. We reject the District Court's conclusion that, with respect to flight officers and pilots, the Secretary was obliged to adddess the carriers' concern that the regulation conflicts with the carriers' obligation to maintain air safety. In the express language of section 43, Congress made it absolutely clear that the hiring preference should apply "regardless of age." 49 U.S.C. § 1552(d)(1) (1982). The safety concerns raised by the Airlines are fully taken account of in sections 220.11(a), 220.20(a), and 220.21(a) of the Secretary's regulations, which leave carriers free to establish and apply safety-related job qualifications to protected employees. These provisions clearly authorize carriers to deny employment to protected employees on safety grounds; it is only the maximum age qualification in and of itself which is prohibited.

On the record before us, there is one aspect of the Secretary's regulations that we find problematic under 5 U.S.C. § 706(2) (1982). The District Court interpreted 29 C.F.R. § 220.29 and 29 C.F.R. § 220.01(j) to mean that "any valid equal employment opportunity agreement" overrides the duty to hire protected employees. However, the actual language of section 220.01(j) suggests that the exception created by section 220.29 is a narrower one. In this appeal, counsel for the government has stated no clear position on the meaning of section 220.01(j). We therefore vacate and remand this portion of the District Court's decision with instructions to remand the issue to the Secretary for clarification of the scope of the equal employment opportunity exception.

Finally, we affirm the District Court's denial of the Airlines' Rule 60(b) motion. The court clearly did not abuse its discretion in declining to give the appellants relief from its original judgment. *See Browder v. Director, Department of Corrections*, 434 U.S. 257, 263 n.7 (1978) (abuse of discretion standard governs review of district court's ruling on Rule 60(b) motion). Insofar as the appellants' motion attempted either to enforce the District Court's original mandate to the Secretary or to present an appeal from the Secretary's subsequent repromulgation of 29 C.F.R. § 220.21(a)(1), their appeal to this court is rendered moot by our reversal of the District Court's decision invalidating and remanding the regulation.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 84-0485

ALASKA AIRLINES, INC., *et al.*,
Plaintiffs,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Defendants,

AIR LINE PILOTS ASSOCIATION INTERNATIONAL, *et al.*,
Intervening Defendants.

January 22, 1986

MEMORANDUM

GESELL, District Judge.

This case involves a multitude of challenges to the Department of Labor's regulations under the employee protection provisions of the Airline Deregulation Act. 49 U.S.C. § 1552. The case is before the Court after remand on motions for summary judgment or affirmance of the Secretary's regulations, there being no material facts in dispute. After reviewing the original and supplementary briefs of the parties and hearing two oral arguments on these issues, the Court makes the following rulings.

Background

When Congress passed the Airline Deregulation Act of 1978 it included an employee protection program to protect employees who had relied on employment with regulated carriers and might be displaced in the transition to a deregulated, competitive market. Airline Deregulation Act, § 43, Pub. L. No. 95-504, 92 Stat. 1705, 1750 (1978) *codified at* 49 U.S.C. § 1552. Although this program, § 43 of the Act, has been in effect for over seven years, its turbulent history has prevented airline employees from receiving any substantial benefits from its provisions.

Section 43 contains two prongs. The first directed the Secretary of Labor to establish a program for providing displaced workers with monetary assistance funded from the United States Treasury, 49 U.S.C. § 1552(a)-(c). Congress has never appropriated funds for this program so no implementing regulations have been promulgated and no assistance has ever been provided by the government.

In addition to this monetary assistance, the statute establishes a second program, § 43(d), which obligates the airlines to give certain "protected employees" a first-right-of-hire when filing job vacancies. The Secretary of Labor's original proposed regulations were noticed for comment in 1979 but never resulted in a final rule. 44 Fed. Reg. 19146 (1979). A revised set of proposed regulations was issued in 1982 and published as a final rule in 1983. 47 Fed. Reg. 41304 (1982); 48 Fed. Reg. 53854 (1983). On the date these regulations became effective, this Court concluded that the unconstitutional legislative veto provision of the statute was not severable from its other provisions and therefore the regulations were invalid. *Alaska v. Donovan*, 549 F. Supp. 92 (D.D.C. 1984). The Court of Appeals disagreed and remanded the case to resolve plaintiffs' remaining challenges to the regula-

tions. *Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550 (D.C. Cir. 1985), *petition for cert. filed*, No. 85-920 (November 27, 1985).

Due to this combination of Congressional inaction, administrative delay and litigation, protection for airline employees has remained an unfulfilled promise. Many airlines have resisted recognizing any duty to hire or taken the position that there is no duty until the Department of Labor regulations become effective. The courts are just now beginning to address the issue of whether a private right of action exists to enforce the duty to hire. *See McDonald v. Piedmont Aviation, Inc.*, 84 Civ. 8262-CLB (S.D.N.Y. January 6, 1986) (holding that private cause of action exists).

The Secretary has now reissued his regulations defining the airlines' duty to hire and requiring airlines to maintain a list of vacancies to assist protected employees in finding jobs. 50 Fed. Reg. 53094 (December 27, 1985). The plaintiffs, representing fifteen airlines that were certificated by the Civil Aeronautics Board prior to deregulation, argue that the Setcretary's regulations are based on an erroneous and unconstitutional interpretation of the Act and that the Secretary arbitrarily and capriciously ignored the conflicts between his regulations and other legal obligations of the airlines.

Discussion

I. The Scope of the Duty to Hire.

The Airlines' primary argument is that the Secretary of Labor's interpretation of the statutory duty to hire is too broad. According to the Airlines, Congress only intended to protect the victims of deregulations—not employees who are terminated due to other reasons, such as poor business practices or general business conditions. But under the Secretary's regulations there is no require-

ment that employees show that their termination or furlough was related to deregulation. An employee is eligible for the hiring preference if he had four years of service with a single regulated airline at the time of deregulation and is involuntarily terminated or furloughed within ten years after the date of deregulation. The only exceptions from this broad definition of eligibility are airline employees who are retired, terminated for cause, on strike, or who voluntarily resign or quit. 29 C.F.R. § 220.10. The Secretary maintains that the broad scope of these regulations is compelled by the language and legislative history of the Act.

Resolving this dispute requires a careful examination of the language of the Act. Congress defined the phrase "protected employee" as a person who at the date of deregulation had been employed for at least four years by a certificated air carrier. 49 U.S.C. § 1552(h)(1). The Airline's argument that not all "protected employees" are protected by the hiring preference is not based on the language of the duty to hire, but on the language used to define those eligible for monetary assistance:

> The Secretary of Labor shall, subject to such amounts as are provided in appropriation Acts, make monthly assistance payments . . . to each individual who the Secretary finds, upon application, to be an *eligible protected employee.* An *eligible protected employee* shall be a *protected employee* who on account of a qualifying dislocation (A) has been deprived of employment, or (B) has been adversely affected with respect to compensation.

49 U.S.C. § 1552(a) (emphasis added). Congress defined a "qualifying dislocation" as a bankruptcy or major contraction of an air carrier occurring during the first ten calendar years after deregulation "the major cause of which is the change in regulatory structure provided by the Airline Deregulation Act of 1978, as determined by

the Civil Aeronautics Board." 49 U.S.C. § 1552(h)(2).[1] Thus, displaced employees were required to trace their unemployment to a CAB determination that they were victims of deregulation in order to qualify for monetary assistance as a "eligible protected employee."

In defining the beneficiaries of the duty to hire program, however, Congress did not use the term "eligible protected employees," but provided that

> Each person who is a *protected employee* of an air carrier . . . who is furloughed or otherwise terminated by such an air carrier (other than for cause) prior to the last day of the 10-year period beginning on October 24, 1978, shall have first right of hire, regardless of age, in his occupational speciality, by any other air carrier hiring additional employees . . .

49 U.S.C. § 1552(d)(1) (emphasis added).

The Court cannot ignore this difference in terminology or dismiss it as accident or mistake. Congress used different terms, separately and carefully defined to describe the employees eligible for these two programs.[2] Only those who are seeking monetary assistance from the government are required to make the rigorous showing that deregulation was the cause of their termination. "Protected employees" who cannot make this showing are still "protected" by the duty to hire provision.

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[1] A "major contraction" is defined as a reduction by at least 7½ percent of the total number of full-time employees of an air carrier within a 12-month period. 49 U.S.C. § 1552(h)(4).

[2] The duty to hire provisions of § 43(d) does use the phrase "eligible protected employee" to establish a special duty on the Secretary to assist those employees receiving monetary assistance from the government in obtaining reemployment. 49 U.S.C. § 1552(d)(2), (3). Congress's special concern with having these employees rehired appears to have been based on the fact that encouraging these employees to invoke the duty to hire would minimize the costs of the monetary assistance program.

This interpretation is consistent with the legislative history of § 43(d). The original version of the Senate Bill limited the duty to hire to protected employees who were "furloughed or otherwise terminated . . . on account of a qualifying dislocation . . . ." S. 2493, 95th Cong., 2d Sess., § 22(d)(2) (1978). The House Bill was more generous, requiring that before carriers could exercise authority under the new act, the Secretary of Labor had to certify that the interests of airline employees who may be affected have been "adequately protected by fair and equitable arrangements providing levels of protection no less beneficial and protective of such interests than those established pursuant" to the employee protection provisions of the Interstate Commerce and Rail Passenger Service Act.[3] H.R. 12611, 95th Cong., 2d Sess., § 32 (1978). As is often the case, the Conference Committee produced a compromise. The Committee adopted almost all of the Senate Bill but deleted the "on account of a qualifying termination" requirement from the duty to hire provision. H.R. Rep. No. 95-1779, 95th Cong., 2d Sess. 105 (1978). Congress enacted this version, retaining the causation requirement for monthly assistance payments but extending the duty to hire to all protected employees terminated or furloughed within the ten year period after deregulation.

Nevertheless, the Airlines argue that even if a "qualifying dislocation" is not required, the Secretary should have considered whether some showing that the employees were terminated due to deregulation should still be required before they can invoke the duty to hire. There is no support in the statute or its legislative history for this position. The duty to hire in § 43(d) is without qualification and there is no indication that Congress delegated any authority to the Department of Labor to limit eligibility or create a system to determine which

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[3] § 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 11347; § 405 of the Rail Passenger Service Act, 45 U.S.C. § 565.

terminations are due to deregulation. The Secretary has consistently interpreted the statute according to its plain language since his first regulations in 1979. The Airlines' real quarrel is with Congress, which decided not to limit airline employees' rights with the same causation requirements found in some other labor protection statutes.

Congress's decision to make the hiring preference over-inclusive may create a burden for the Airlines and lead to anomalous results in individual cases, but it is not unconstitutional. Airline representatives testified before Congress that there was no way to determine which employees were victims of general business circumstances and which were victims of regulatory reform.[4] Given this testimony it was reasonable for Congress and the Secretary of Labor to adopt a broad definition of the duty to hire in order to insure that employes who may have been displaced by deregulation receive some protection. If each employee had to demonstrate that their termination or furlough was connected to deregulation many deserving individuals might be denied the hiring preference. The fact that Congress apparently chose to be more generous with the airlines' money than with the public's does not provide any basis for the Court to impose a different interpretation and invalidate the Secretary's regulations. "We are not members of Congress, with the power to rewrite the terms of a law which may have revealed infirmities in its implementation." *American Federation of Government Employees, AFL-CIO v. Federal Labor Relations Authority,* No. 84-1512, slip op. at 23 (D.C. Cir., December 13, 1985).

Even if the Secretary's position was not so strongly supported by the language of the statute and its history,

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[4] Statement of Richard J. Ferriss, President, United Airlines, Hearings before the Subcommittee on Aviation of the Committee on Public Works and Transportation of the House of Representatives on H.R. 8813, 95th Cong., 1st Sess. 1368 (1977).

the Airlines have been unable to point to any indication that Congress considered this issue and intended to limit the duty to hire. The numerous statements quoted by the Airlines only indicate that Congress intended to help those who were victims of deregulation, not that they intended to exclude those who could not demonstrate a connection. The Secretary of Labor's regulations are consistent with the language of the statute and his interpretation of Congress's intent is a reasonable one that must be upheld by the Court. *Chevron, U.S.A., Inc. v. National Resources Defense Council*, 104 S.Ct. 2778 (1984). In addition, it may be noted that the Secretary's regulations have been before Congress since November of 1983 and despite the Court of Appeal's decision holding that § 43(d) is severable from the unconstitutional legislative veto provision, Congress has not taken any action to alter the mandate of § 43(d) or the Secretary's interpretation of it.[5]

Finally, the Airlines also argue that the statute and the Secretary's regulations violate due process and equal protection because the duty to hire is only imposed upon airlines that had received CAB certification before deregulation and does not apply to intrastate carriers who were never certified and new airlines that have arisen since deregulation. This contention is without merit. Economic regulation must be upheld against due process and equal protection challenges unless the statute's classification is wholly irrational. At the time the Deregulation Act was passed Congress believed that regulated carriers had been the beneficiaries of a system which protected them from competition, resulting in more costly and less efficient service to consumers. S. Rep. No. 95-

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[5] The Airlines have also voiced a last minute objection that the reissued regulations have not been submitted to Congress for the sixty-day period required by § 43(f), 49 U.S.C. § 1552(f). Since these regulations are substantially the same as those submitted to Congress in 1983 no resubmission is required.

631, 95th Cong., 2d Sess. 113 (1978). Congress decided that the beneficiaries of regulation should bear the burden of displacements that might occur as a result of deregulation. Placing the duty to hire on all certificated carriers as of the date of deregulation may have been a crude way of achieving this result, but it is not irrational or unconstitutional.

II. Conflict with Other Legal Obligations of the Airlines.

The Secretary of Labor argues that many of the other challenges raised by the Airlines are not ripe for adjudication. It is clear that many of the questions discussed or alluded to in the parties' briefs are not yet ripe. This Court need not determine whether their airline employees have a private right of action under the act as the Secretary has suggested and one federal court has found. Nor is the question of the termination date of the program ripe for decision. Nor is the issue of whether a protected employee who subsequently finds a job with another airline can quit and invoke the duty to hire preference in seeking another job ripe.

Nonetheless, the issues Airlines have pressed are ripe for review to the extent they present facial challenges to the Secretary's rulemaking. All of the prerequisites for review are satisfied. These final rules are a final agency action. They will have a "direct and immediate" impact on the way the Airlines conduct their personnel practices. Finally, the questions of whether these regulations on their face improperly conflict with other legal obligations of the Airlines are fit for judicial resolution. *Better Government Association v. Department of State*, No. 84-5928, slip op. at 11-14 (D.C. Cir., January 3, 1986).

A. *Safety Considerations.*

The Airlines argue that three aspects of the Secretary's regulations interfere with their obligation to maintain the highest possible standard of safety. Al-

though there is no indication that Congress considered how the employee protection provisions were to relate to safety concerns, it did state that implementation of the Deregulation Act should result in "no diminution of the high standard of safety in air transportation attained in the United States on October 24, 1978." 49 U.S.C. § 1307(a). Congress and the courts have repeatedly emphasized that airlines are under a legal obligation to operate with the highest possible degree of care. *Murnane v. American Airlines*, 667 F.2d 98, 101 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

The Airline's first objection on safety grounds has been thoroughly and adequately answered by the Secretary in the course of the rulemaking. The Airlines argue that the regulations' requirement that they keep a vacancy open for thirty days in order to allow a protected employee to apply for the position imposes an unworkable requirement that will, among other things, impairs safety. *See* 29 C.F.R. § 220.24. The Secretary addressed these concerns in promulgating the final rule and concluded that they were speculative in light of the industry's practice of accepting advance applications and any problems could be mitigated by maintaining files of advance applications or listing anticipated vacancies. 50 Fed. Reg. at 53095 (1985). Employees unexpectedly die, retire, become ill or resign everyday and the airlines are able to adjust by hiring temporary employees or reassigning staff without jeopardizing their safety record. The Secretary's imposition of a waiting period was not arbitrary or capricious.

The Airlines' second safety concern raises one rather technical defect. The regulations permit carriers to apply any prerequisites or qualifications they desire, except limitations based on seniority, recall rights or previous experience with another airline and initial hiring age (excluding retirement ages). 29 C.F.R. § 220.21. Because the initial hiring age of flight officers and pilots

may affect the amount and adequacy of the training and experience they receive, the courts, in the context of the Age Discrimination Act, have recognized otherwise impermissible initial age requirements may be bone fide occupational qualifications because of the safety obligations of the airlines. *Murnane v. American Airlines*, 667 F.2d 98, 101 (D.C. Cir. 1981), *cert. denied* 456 U.S. 915 (1982). Although the Airline Deregulation Act states that the duty to hire shall apply "regardless of age," another judge of this court, in construing Congress's intent in this provision, concluded that Congress must not have intended to prohibit age requirements imposed for safety reasons. "Only this interpretation preserves the important occupational qualifications required in the interest of air safety." *Murnane v. American Airlines, Inc.*, 482 F. Supp. 135, 153 (D.D.C. 1979), *aff'd*, 669 F.2d 98.

Although the interpretation in the *Murnane* decision is "dicta," it demonstrates that the Airlines' concern is a substantial one. The arguments now advanced by counsel for the Secretary for a different interpretation may be correct, but they are still after-the-fact rationalizations that cannot satisfy the need for the Secretary himself to address such an important issue when it is raised in rulemaking comments, as it was here. *Action On Smoking and Health*, 699 F.2d 1209, 1216 (1983); *Ace Motor Freight v. I.C.C.*, 557 F.2d 859, 864 (D.C. Cir. 1977). Invalidating the entire rule under these circumstances is obviously not an appropriate remedy. The Court will invalidate the provision on initial hiring age as to flight officers and pilots alone, and remand the issue to the Secretary for further explanation.[6]

The Airlines' final safety complaint is meritless. They object that the regulations prevent them from hiring the "safest" employees possible because they have a duty to

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[6] The Secretary need not reopen the existing record if he finds that it is adequate to address this issue on remand.

hire protected employees first. This objection was never raised in any significant way during the rulemaking. It is not a real conflict, but an effort by the Airlines to create an apparent conflict that would undermine the language and purpose of the statute. If carriers had absolute discretion to choose the "safest" applicants, the hiring preference would be virtually meaningless. Moreover, aside from the restrictions mentioned above, the regulations permit carriers to require that job applicants, including protected employees, meet any standard qualifications the carriers' desire and give them discretion in choosing from among the pool of protected employees who meet these requirements. Finally, it is inherent in the statute itself that protected employees will already be experienced in their fields and airline safety.

B. Equal Employment Opportunity.

The Secretary's regulations provide that the duty to hire shall take precedence over any equal employment opportunity obligations unless the airline is subject to a specific equal employment requirement pursuant to a federal court or administrative order, consent decree or conciliation agreement providing relief by virtue of the carrier's unlawful employment discrimination and the airline cannot meet these requirements from the pool of employees eligible for the hiring preference. 29 C.F.R. §§ 220.01(j); 220.29. The Airlines' object that the exemption is inadequate because it conflicts with their general obligation under Title VII and other statutes and does not cover voluntary decrees which contain no admission of unlawful discrimination.

There is no merit in this contention. There is no facial conflict between Title VII and the Secretary's regulations under the Airline Deregulation Act. An individual decision or a pattern of hiring decisions dictated by the statute's duty to hire could not be the basis for a claim of unlawful discrimination against a carrier. The Airlines' challenge is largely based on a misinterpretation of the

regulations, which the Department of Labor says includes any valid equal employment opportunity agreement, with or without a recital of liability. Unlike the comments on safety and hiring age, the Secretary directly addressed the Airlines' comments on conflicts with equal employment obligations by consulting with the Equal Employment Opportunity Commission, amending the initial rule to provide more flexibility and giving his reasons in the statement on the final rule. 50 Fed. Reg. at 53095-96 (1985). His conclusion that the duty to hire should take precedence, except in those instances provided in the rule, is a reasonable accommodation of the conflicting policies.

C. Conflict with the Railway Labor Act.

The Airlines' final objection is that the regulations improperly upset the delicate employer-employee "balance" established by the Railway Labor Act by giving terminated strikers rights under the duty to hire. The contention that this will somehow "tilt" the balance in a way that is inconsistent with the statutory scheme for handling labor disputes is based on the most imaginative type of speculation. The Secretary directly and adequately addressed this supposed "conflict" in fashioning the final rule and his decision was a reasonable accommodation of the policies involved.

The remaining objections in the Airlines' broadside attack are equally frivolous and must be rejected. An appropriate order dismissing the complaint, except with respect to the initial hiring age of flight officers and pilots, as indicated above, filed herewith.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5042 and Consolidated Cases 86-5085, 86-5719

ALASKA AIRLINES, INC., *et al.*

v.

WILLIAM E. BROCK, individually
and as Secretary of Labor, *et al.*

March 9, 1987

BEFORE: EDWARDS, BUCKLEY and D. H. GINSBURG, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5042 and Consolidated Cases 86-5085, 86-5719

ALASKA AIRLINES, INC., *et al.*

v.

WILLIAM E. BROCK, individually and as Secretary of Labor, *et al.*

March 9, 1987

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D. H. Ginsburg, Circuit Judges

ORDER

Appellants' suggestion for rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge Silberman did not participate in this order.

APPENDIX E

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES

49 U.S.C. app. § 1552 (1982). Employee protection program.

(a) General rule

(1) The Secretary of Labor shall, subject to such amounts as are provided in appropriation Acts, make monthly assistance payments, or reimbursement payments, in amounts computed according to the provisions of this section, to each individual who the Secretary finds, upon application, to be an eligible protected employee. An eligible protected employee shall be a protected employee who on account of a qualifying dislocation (A) has been deprived of employment, or (B) has been adversely affected with respect to his compensation.

(2) No employee who is terminated for cause shall receive any assistance under this section.

(b) Monthly assistance computation

(1) An eligible protected employee shall, subject to such amounts as are provided in appropriation Acts, receive a monthly assistance payment, for each month in which he is an eligible protected employee, in an amount computed by the Secretary. The Secretary, after consultation with the Secretary of Transportation, shall, by rule, promulgate guidelines to be used by him in determining the amount of each monthly assistance payment to be made to a member of each craft and class of protected employees, and what percentage of salary such payment shall constitute for each applicable class or craft of employees. In computing such amounts for any individual protected employee, the Secretary shall deduct from such amounts the full amount of any unemployment compensation received by the protected employee.

(2) If an eligible protected employee is offered reasonably comparable employment and such employee does not accept such employment, then such employee's monthly assistance payment under this section shall be reduced to an amount which such employee would have been entitled to receive if such employee had accepted such employment. If the acceptance of such comparable employment would require relocation, such employee may elect not to relocate and, in lieu of all other benefits provided herein, to receive the monthly assistance payments to which he would be entitled if this paragraph were not in effect, except that the total number of such payments shall be the lesser of three or the number remaining pursuant to the maximum provided in subsection (e) of this section.

(c) Assistance for relocation

If an eligible protected employee relocates in order to obtain other employment, such employee shall, subject to such amounts as are provided in appropriation Acts,

receive reasonable moving expenses (as determined by the Secretary) for himself and his immediate family. In addition, such employee shall, subject to such amounts as are provided in appropriation Acts, receive reimbursement payments for any loss resulting from selling his principal place of residence at a price below its fair market value (as determined by the Secretary) or any loss incurred in cancelling such employee's lease agreement or contract of purchase relating to his principal place of residence.

(d) Duty to hire protected employees

(1) Each person who is a protected employee of an air carrier which is subject to regulation by the Civil Aeronautics Board who is furloughed or otherwise terminated by such an air carrier (other than for cause) prior to the last day of the 10-year period beginning on October 24, 1978, shall have first right of hire, regardless of age, in his occupational speciality, by any other air carrier hiring additional employees which held a certificate issued under section 1371 of this Appendix prior to October 24, 1978. Each such air carrier hiring additional employees shall have a duty to hire such a person before they hire any other person, except that such air carrier may recall any of its own furloughed employees before hiring such a person. Any employee who is furloughed or otherwise terminated (other than for cause), and who is hired by another air carrier under the provisions of this subsection, shall retain his rights of seniority and right of recall with the air carrier that furloughed or terminated him.

(2) The Secretary shall establish, maintain, and periodically publish a comprehensive list of jobs available with air carriers certificated under section 1371 of this Appendix. Such list shall include that information and detail, such as job descriptions and required skills, the Secretary deems relevant and necessary. In addition to publishing the list, the Secretary shall make every effort

to assist an eligible protected employee in finding other employment. Any individual receiving monthly assistance payments, moving expenses, or reimbursement payments under this section shall, as a condition to receiving such expenses or payments, cooperate fully with the Secretary in seeking other employment. In order to carry out his responsibilities under this subsection, the Secretary may require each such air carrier to file with the Secretary the reports, data, and other information necessary to fulfill his duties under this subsection.

(3) In addition to making monthly assistance or reimbursement payments under this section, the Secretary shall encourage negotiations between air carriers and representatives of eligible protected employees with respect to rehiring practices and seniority.

(e) Period of monthly assistance payments

(1) Monthly assistance payments computed under subsection (b) of this section for a protected employee who has been deprived of employment shall be made each month until the recipient obtains other employment, or until the end of the 72 months occurring immediately after the month such payments were first made to such recipient, whichever first occurs.

(2) Monthly assistance payments computed under subsection (b) of this section for a protected employee who has been adversely affected relating to his compensation shall be paid for no longer than 72 months, so long as the total number of monthly assistance payments made under this section for any reason do not exceed 72.

(f) Rules and regulations

(1) The Secretary may issue, amend, and repeal such rules and regulations as may be necessary for the administration of this section.

(2) The rule containing the guidelines which is required to be promulgated pursuant to subsection (b)

of this section and any other rules or regulations which the Secretary deems necessary to carry out this section shall be promulgated within six months after October 24, 1978.

(3) The Secretary shall not issue any rule or regulation as a final rule or regulation under this section until 30 legislative days after it has been submitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Public Works and Transportation of the House of Representatives. Any rule or regulation issued by the Secretary under this section as a final rule or regulation shall be submitted to the Congress and shall become effective 60 legislative days after the date of such submission, unless during that 60-day period either House adopts a resolution stating that House disapproves such rules or regulations, except that such rules or regulations may become effective on the date, during such 60-day period, that a resolution has been adopted by both Houses stating that the Congress approves of them.

(4) For purposes of this subsection, the term "legislative day" means a calendar day on which both Houses of Congress are in session.

(g) Airline employees protective account

All payments under this section shall be made by the Secretary from a separate account maintained in the Treasury of the United States to be known as the Airline Employees Protective Account. There are authorized to be appropriated to such account annually, beginning with the fiscal year ending September 30, 1979, such sums as are necessary to carry out the purposes of this section, including amounts necessary for the administrative expenses of the Secretary related to carry out the provisions of this section.

(h) Definitions

For the purposes of this section—

(1) The term "protected employee" means a person who, on October 24, 1978, has been employed for at least 4 years by an air carrier holding a certificate issued under section 1371 of this Appendix. Such term shall not include any members of the board of directors or officers of a corporation.

(2) The term "qualifying dislocation" means a bankruptcy or major contraction of an air carrier holding a certificate under section 1371 of this Appendix, occurring during the first 10 complete calendar years occurring after October 24, 1978, the major cause of which is the change in regulatory structure provided by the Airline Deregulation Act of 1978, as determined by the Civil Aeronautics Board.

(3) The term "Secretary" means the Secretary of Labor.

(4) The term "major contraction" means a reduction by at least 7½ percent of the total number of full-time employees of an air carrier within a 12-month period. Any particular reduction of less than 7½ percent may be found by the Board to be part of a major contraction of an air carrier if the Board determines that other reductions are likely to occur such that within a 12-month period in which such particular reduction occurs the total reduction will exceed 7½ percent. In computing a 7½-percent reduction under this paragraph, the Board shall not include employees who are deprived of employment because of a strike or who are terminated for cause.

(i) Transfer of authority of Board

The authority of the Board under this section is transferred to the Department of Transportation on January 1, 1985.

(j) Termination

The provisions of this section shall terminate on the last day the Secretary is required to make a payment under this section.

(Pub. L. 95-504, § 43, Oct. 24, 1978, 92 Stat. 1750.)

REFERENCES IN TEXT

The Airline Deregulation Act of 1978, referred to in subsec. (h)(2), is Pub. L. 95-504, Oct. 24, 1978, 92 Stat. 1705, as amended. For complete classification of this Act to the Code, see Short Title of 1978 Amendment note set out under section 1301 of this Appendix and Tables.

CODIFICATION

Section was enacted as part of the Airline Deregulation Act of 1978, and not as part of the Federal Aviation Act of 1958 which comprises this chapter.

TRANSFER OF FUNCTIONS

All functions, powers, and duties of the Civil Aeronautics Board were terminated or transferred by section 1551 of this Appendix, effective in part on Dec. 31, 1981, in part on Jan. 1, 1983, and in part on Jan. 1, 1985.

For transfer of certain enforcement functions of the Secretary or other official of the Department of Transportation relating to compliance with this chapter and the authorizations and regulations issued thereunder to the Federal Inspector, Office of Federal Inspector of the Alaska Natural Gas Transportation System, see Transfer of Functions note set out under section 1301 of this Appendix.

28 U.S.C. § 1254 (1982). Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

REGULATIONS

DEPARTMENT OF LABOR

Bureau of Labor-Management Relations and Cooperative Programs

29 CFR Part 220

Airline Employee Protection Program

AGENCY: Bureau of Labor-Management Relations and Cooperative Programs, Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor, through the Bureau of Labor-Management Relations and Cooperative Programs (BLMRCP), is issuing regulations to implement the Airline Employee Protection Program established by Section 43 of the Airline Deregulation Act of 1978 (Pub. L. 95-504). By Secretary's Orders Number 1-79 and 5-84, the (BLMRCP) has been assigned responsibility for provisions concerning protected employees' priority hire rights, air carriers' duty to hire and the comprehensive job listing. These rules are designed to effectuate those provisions.

EFFECTIVE DATE: January 27, 1986.

FOR FURTHER INFORMATION CONTACT: Jeffrey Salzman, Airline Employee Protection Program, Division of Employee Protections, Room N-5416 U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210. Phone: (202) 357-0473.

SUPPLEMENTARY INFORMATION:

Background

On October 24, 1978, the Airline Deregulation Act of 1978, Pub. L. 95-504 (the Act), was signed into law to bring to a close economic regulation of the airline indus-

try. Although airline deregulation is expected to result in expanded overall employment opportunities over the long term. Congress recognized the possibility of reduction of the labor force of one or more air carriers as they make the adjustment from government regulation to an economic environment governed by market forces. Section 43 of the Act provides in general terms for certain employee protective provisions to be administered by the Secretary of Labor. Those provisions include both a legal hiring preference for certain unemployed airline workers and, under contain defined circumstances, a benefit program. These regulations apply only to the first-right-of-hire and job list provisions contained in Section 43 of the Act (the Rehire Program).

Under the Act, those persons (other than members of the board of directors or corporate officers) who as of October 24, 1978 (the Trigger Date) had been employed for at least four years by an air carrier which had been certificated under section 401 of the Federal Aviation Act of 1958 on or before that date (any such carrier being hereinafter called a covered air carrier) are protected employees for purposes of the Rehire Program. All protected employees who are furloughed or terminated (other than for cause) by their employer during the ten year period subsequent to the Trigger Date (hereinafter called "designated employees") are entitled to a first-right-of-hire in their occupational speciality by any covered air carrier which is hiring new employees, except that any such covered air carrier is specifically entitled to recall its own furloughed or terminated employees or promote or transfer existing employees before hiring a designated employee. Air carriers which are not covered carriers for purposes of the Act do not have any duty to hire designated employees. In addition, the Act requires the Secretary to compile and publish a comprehensive list of jobs available with certificated air carriers, whether or not such carriers are subject to the duty to hire designated employees.

In January of 1979, public meetings were held with interested parties from the airline industry to obtain their views concerning development of this program. Proposed regulations were published in March of 1979 in the Federal Register and public comments were received. However, a final rule from this rulemaking proceeding was never published.

The Department published a revised proposal on September 17, 1982, 47 FR 41304, with a 30-day review and comment period.

Final Regulations were published on November 22, 1983, 48 FR 52854, with an effective date of 60 legislative days after submission to Congress. The regulations were submitted to Congress on November 17, 1983, and took effect on May 17, 1984. Technical amendments to reflect the re-organization of the Labor-Management Services Administration and provide information collection control numbers were published on May 18, 1985. The Department also published a notice of effective date at that time. 49 FR 21053.

On May 17, 1984, however, the United States District Court for the District of Columbia held that the legislative veto provision in section 43 of the Airline Deregulation Act was unconstitutional and that other provisions of section 43 were also invalid because they were not severable from the legislative veto provision. *Alaska Airlines, et al.* v. *Donovan* 594 F. Supp. 92 (D.C.D.C. 1984). On May 24, 1984, the Department published a notice rescinding the May 18 notice of effective date, pursuant to court order. 49 FR 21499. On July 16, 1985, the United States Court of Appeals for the District of Columbia Circuit reversed the District Court. *Alaska Airlines* v. *Donovan* (D.C. Cir. 1985). The mandate from the Court of Appeals was issued on October 9, 1985.

The Court of Appeals remanded the case, now titled *Alaska Airlines* v. *Brock* to the District Court for further

proceedings on other issues raised by the carriers. In the absence of further legal impediments to implementation of the Rehire Program and because there have already been lengthy delays, the Department intends to implement the Rehire Program at the end of the normal 30-day notice period.

Discussion of Major Comments and Changes

The Department received written responses from 34 air carriers, labor organizations, civil rights organizations, and employees. The Department gave full consideration to all comments and suggested changes. Discussed below are the major comments and changes.

Rehire Program and Qualifying Dislocation

Section 43 of the Act distinguishes between protected employees and eligible protected employees. In the proposal accordingly we took the position that protected employees who are furloughed or terminated other than for cause ("designated employees" under this rule) are entitled to a first-right-of-hire. There is no requirement for determinations by the Civil Aeronautics Board or its successor, the Department of Transportation (DOT), that there has been a major contraction in employment or that such contraction was due to deregulation. Eligible protected employees may receive monetary benefits if the DOT makes the above determinations.

Air carriers took issue with the foregoing interpretation. They argued that the distinction between protected and eligible protected employees is not supported by the Act nor by its legislative history. Moreover, the air carriers stated that such a distinction, providing the first-right-of-hire without the need for a major employment impact or a finding of cause by the DOT was not consistent with other protective statutes, which were specifically remedial.

The Department has reviewed the legislative history and has concluded that the interpretation set forth in the proposed regulations accurately reflects Congressional intent to provide the first-right-of-hire even though a bankruptcy or major contraction has not occurred. Key to the Department's interpretation is the deletion from the legislation as finally enacted of the precise language which formerly conditioned the first-right-of-hire on the triggering requirements outlined above for monetary benefits. These triggering requirements were clearly a condition for both forms of benefits (hiring and monetary) when the deregulation bill (S. 2493) was passed by the Senate. However, the final bill which emerged from the joint House-Senate Conference dropped the triggering conditions for the first-right-of-hire provisions. The conference bill was passed into law unchanged. In the face of this clear and deliberate action on the part of the Congress, the Department has no latitude to reintroduce these requirements for the hiring priority benefit.

Waiting Period

The Department proposed that covered air carriers could hire nondesignated employees if no qualified designated employees had applied in a timely manner. The waiting period before carriers could hire nondesignated employees would end 30 days after the listing had been called in to the Center. Carriers stated that this period would be too long and would place an excessive burden on their operations. The Department, however, believes that the prevalent practice in the industry of accepting advance applications, which this regulation recognizes, will relieve carriers of delays in filing vacancies. A carrier will be free to fill a job with a designated employee from an advance application at the time it lists the vacancy with the Center, and there will be no waiting period. Such a listing should indicate that the job has

already been filed, and the carrier would not receive unwanted applications.

A number of smaller covered carriers stated that the 30-day waiting period worked a particular hardship on their operations. They generally do not hire in large classes, and their small work forces at many stations have greater difficulty performing additional duties while a job is being filled. We agree that any burden which might occur as a result may be greater on such smaller carriers. The Department seriously considered reducing the waiting period for carriers operating smaller aircraft. But the period of time that elapses between a listing and its availability to employees precludes any significant relief which would still afford designated employees an opportunity to apply for the job. We have concluded that a 30-day period is necessary to effectuate the statutory rights of protected employees. Smaller carriers, however, can mitigate any possible burdens by maintaining files of advance applications or by listing anticipated vacancies.

One commentator suggested that carriers should be required to retain applications for a 12-month period. The Department rejected this provision because a uniform requirement might unduly burden some carriers. However, we suggest that carriers develop prudent retention policies for unsolicited and advance applications in the event that a designated employee alleges that a carrier did not consider the employee's application prior to hiring a non-designated employee.

Exemption From the Duty to Hire

Several small regional and former charter carriers sought exemption from the duty to hire on a variety of grounds. Two carriers, for example, had obtained their certificates only weeks before the Act became effective. Others suggested that it was anomalous to cover such carriers, many of which had no protected employees.

These carriers commented that they had not enjoyed the benefits of the regulated system and thus should not be encumbered with the protective requirements under deregulation. Congress, they stated, could not have intended to burden this group of carriers. Several noted that they essentially resembled the new entrants, which do not have a duty to hire.

The Department cannot agree with these claims. The explicit language of Section 43(d) imposing the duty on all covered carriers is clear and compelling. Congress anticipated that carriers would experience economic adjustments in a deregulated environment. Under the statute, protected employees, who lose jobs at a shrinking carrier, will be able to obtain employment with a growing one. Statutory language must be construed in the context of the overall statutory purposes—in this case, the reemployment of designated employees. The Department therefore has concluded it would be inappropriate to provide exemptions and reduce preferential hiring opportunities.

Definition of Protected Employee

The proposal provided protection based on accrued seniority as well as employment. The Department received comments supporting its proposed definition as well as comments seeking to broaden the definition or to restrict it. An industry association suggested that we amend proposed section 220.01(j) to require a protected employee to be in compensated service for 40 consecutive months and have an employment relationship with that carrier on the Trigger Date (October 24, 1978). We believe that the suggested requirement of consecutive compensated service would be excessively restrictive and would not provide an accurate measure of long term attachment to the industry, which is the general basis on which Congress conferred protection on airline employees.

Upon review of the statutory definition of a protected employee, however, we do agree with the association that protected employees should have an employment relationship with a covered air carrier on the effective date of the Act. Employees who have been furloughed and recalled display that attachment to the industry. Similarly, employees who have the four years of service or accrued seniority with a particular carrier, but who shift employment to another covered carrier, also have had that same reliance on the regulated system as the employee whose entire career is spent at one carrier.

Pursuant to our requirement for an employment relationship, we have altered the notice of protected status in § 220.25(c)(1) so that such notice would go to the carriers workers who had an employment relationship on October 24, 1978. This requirement would focus the notice on those employees who meet at least one of the two criteria for attaining protected status and will facilitate the process of determining who is protected.

Other commentators stated that the Department was too restrictive. One union suggested utilizing an employee's date of hire as the beginning of the service period for determining protected status because contracts differ on determining accrual of seniority. We note, however, that the contractual provisions which that union submitted generally provide for accrual of seniority during major breaks in compensated service such as furloughs, sick leave, maternity leave. While we recognize that the Department's definition may lead to differential results among similarly situated employees, we do not believe that the differentiation will be substantial.

Several commentators disagreed with the Department's position that four years of service or seniority had to be with a single carrier in order to achieve protected status. Thus an employee who had spent only two years with one carrier and only two years with another carrier prior to 1978 would not be protected. The Department bases its position on the explicit language of Sec-

tion 43(h)(1): "* * * employed for at least four years by *an* [emphasis added] air carrier * * *." The Senate Commerce Committee in reporting out the legislation, used the term service with "a *particular* [emphasis added] airline." We believe that the statutory language and the committee report reflect a Congressional intent that service or seniority must be with only one carrier in order to qualify as a protected employee.

Equal Employment Opportunity

Section 29 of the proposed rule stated that the first-right-of-hire shall take precedence over any equal employment opportunity [EEO] obligations which a carrier may have. After consultations between the Department of Labor and the Equal Employment Opportunity Commission, it was agreed that latitude existed to accommodate the requirements of both the ADA and EEO statutes. Since covered air carriers remain free to select any applicant from among the pool of designated employees, the Department believes that air carriers will be able to accommodate both their duty to hire designated employees and their equal employment obligations in most cases. Where this is not possible, a carrier having a specific equal employment requirement as defined in section 220.01(j) of the regulation may hire a non-designated employee. Every carrier remains responsible for following the hiring procedures set forth in the regulation.

New Entrants' Requirement to List Vacancies

The Department had proposed that new entrant carriers as well as the prederegulation carriers list their job vacancies in the comprehensive listing. Several new entrants objected to this obligation. They argued that the comprehensive list required by Section 43(d)(2) was intended only to complement the duty to hire and that the Department's application of this requirement to new entrants was unreasonable and unnecessary. Such listings,

they believe, would be futile since carriers which do not have an obligation to hire would be required to list jobs they already may have filled by the time designated employees applied.

In proposing this section, the Department was guided by the explicit language of section 43(d)(2) which establishes the requirement for a comprehensive list of jobs available with *all* carriers certificated under section 401 of the Federal Aviation Act. By contrast, the duty to hire is imposed on carriers certificated prior to deregulation. Furthermore, publication of a truly comprehensive list is consistent with the overall statutory purpose of section 43. The Congress anticipated that while the industry as a whole would grow, there might be some job losses at some carriers. A protection program was written to cushion adverse effects on workers. Publication of a comprehensive list will announce job vacancies to these workers and facilitate their reemployment. To the extent that some of these workers may be eligible for monetary benefits, assistance to them in obtaining any reasonable comparable employment will lessen the cost of the monetary benefits program.

Recall Rights

The proposed rule preserved, in accordance with express statutory language, seniority and recall rights at the designated employee's former carrier. In implementing this provision, the Department proposed to permit carriers to require disclosure of any such rights. Several unions objected to the disclosure of recall rights on the grounds that it would either preclude hiring of designated employees possessing these rights or coerce employees into relinquishing these rights.

While the Department recognizes that the commentators' contentions may have some validity, it believes that carriers hiring designated employees have a compelling interest in retaining these designated employees. Consid-

erable time and expense is usually invested in new hires, and the regulations must reflect these practical considerations. Disclosure does not, in any event, diminish the carrier's duty to hire. It only permits a carrier to distinguish among designated employees according to the extent of seniority or recall rights in addition to other criteria.

Several commentators sought to have carriers hire on the basis of the seniority of the designated employees. It is clear, however, that the statute does not require this approach. Moreover, any program based on it would be virtually impossible to administer. The Department has sought to implement this program without imposing any new obligations on the carriers that are not required by the statute as it pertains to the selection of employees.

Temporary and Seasonal Employees

Recognizing the prevailing practice in the industry of hiring temporary and seasonal employees, such as college students and military personnel during the Christmas holidays and periods of peak summer travel, the Department proposed to permit carriers to fill seasonal and temporary positions outside of the Rehire Program. Under the proposed rule, carriers could not promote or reassign such employees into permanent positions unless the employees held seniority or recall rights.

Several carriers opposed this restriction on promotion because their typical employee selection procedure is to hire initially on a temporary or seasonal basis and promote into permanent positions. The regulations would force them to change their hiring practices. The Department cannot accept these comments without defeating the overall purpose of the Rehire Program. Where carriers utilize temporary or seasonal employment as a means of selecting permanent employees, they should list the vacancies and hire designated employees. They would then be free to promote them into permanent jobs; we have

modified § 220.20(b) accordingly. In other instances where carriers accord seniority or recall rights to temporary or seasonal workers, those workers would not be defined as temporary or seasonal under these regulations, and the restriction on promotion would not apply.

One union requested that the Department specify the duration of temporary or seasonal employment. However, because seasonal or temporary periods may vary greatly from carrier to carrier and a uniform time period may be unworkable for some carriers, the Department does not believe that it would be appropriate to make a fixed rule concerning the duration of seasonal or temporary periods.

Responsibilities of Non-Operating Carriers

Several commentators noted that carriers which were no longer operating might not be able to provide the lists of protected employees or the notices of rights required by §§ 220.25 and 220.27. The statute requires all certificated carriers, whether operating or not, to meet the requirements of §§ 220.25 and 220.27. However, we recognize that compliance may be more difficult for some carriers. We have written letters to officials or owners of those carriers which we believe are not presently operating seeking information on any problems they might expect in complying. The Department is attempting to provide an opportunity for full participation of all designated employees in the Rehire Program.

Participation of Labor Organizations

Several unions sought an enhanced role in the implementation of the program. One union suggested that the list of protected employees should be made available to collective bargaining representatives to minimize subsequent appeals. The Department naturally hopes to minimize appeals, but since consultations appear to be in the interests of both carriers and unions, we think it is un-

necessary to regulate this activity. In § 220.26 the commentator sought authorization for unions to file appeals on behalf of their members. We agree, to the extent that representation is authorized, and have made the appropriate change.

In addition, this union also wanted collective bargaining representatives to receive copies of the comprehensive job list. The Department has made provision for some 500 additional copies of the list beyond those to be sent to the local offices of the employment service. Prior to the effective date of these regulations, the Department will determine those unions, media, or other organizations which will receive the job listings.

Eligibility for Designated Status

Under the proposed § 220.10 the Department set forth criteria to determine whether or not a protected employee has been furloughed or terminated within the meaning of the Act. In addition to retirees and voluntary quits, we stated that strikers, employees who respect picket lines, or employees who had been terminated for being on strike would not be eligible for the Rehire Program. Several unions opposed these positions arguing that our prohibitions would have a chilling effect on the exercise of rights to concerted activity under the Railway Labor Act.

We think it is evident that strikes and sympathy strikes are neither furloughs nor terminations, which the Act requires to initiate a preference in hiring. A contrary interpretation would be inconsistent with the Act and would provide striking employees with a significant weapon in labor disputes. We do not believe that Congress intended such a result. On the other hand, we agree that terminations for being on strike are similar to other forms of involuntary termination, and we have deleted that exclusion.

One union noted that the phrase "has withheld services" in § 220.10(b)(4) could be interpreted to exclude employees who had ever done so. The Department did not intend this, and we have changed the paragraph to make it parallel to the exclusion for being on strike.

Notices of Rights

In proposed § 220.27 carriers would have as much as 180 days to provide furloughed employees with notices of their designated status. We have reduced that period to 60 days. Carriers should not have any difficulty in meeting this requirement, regardless of whether they use automated personnel systems. Employees should not have to wait six months to obtain the document which confirms designated status and eligibility for the Rehire Program. In addition, we specifically require carriers to replace lost notices of rights.

Effective Period

The Department indicated in its notice of proposed rulemaking that the regulations would apply on their effective date. Certain carriers construed the proposed rule to indicate that the duty to hire and the first-right-of-hire would not apply until the regulations become effective. This is a misunderstanding of the Department's position. While any requirements imposed by the regulations will of course not be in force before the rule's effective date, the rights and duties under section 43(d) which flow directly from the Act have existed since October 24, 1978. These regulations merely facilitate the exercise of statutory rights and duties. We have modified §§ 220.01(g) and 220.50 to prevent any further misunderstanding with respect to the effective date of these regulations and the statutory rights and obligations.

Additional Modifications

In addition to the modifications discussed above, the Department has also made the following changes: (1)

In § 220.25(c)(3) we have imposed a 15-day period for carriers to answer appeals and a corresponding change in section 220.26(a). (2) In § 220.28 we require two copies of the semi-annual report.

Summary of the Final Rule

There follows a summary of the final rule, as modified in the fashion discussed above. The regulations are divided into six subparts:

Subpart A contains the purpose, scope, responsibilities and definitions applicable to this Part 220. It should be noted that a number of these provisions contain significant administrative interpretations of the Act. Of particular importance is the definition of a protected employee contained in § 220.01(1). This definition limits the scope of the Rehire Program to an employee who had an employment relationship with a covered air carrier on the Trigger Date and who occupies a position which entitles the individual to accrue seniority rights or to possess recall rights under the applicable collective bargaining agreement or company policy. Specifically, this definition exempts a seasonal or temporary employee who does not occupy such a position.

Similarly, positions which are seasonal or temporary and do not confer seniority or recall rights have been exempted from the vacancy filing requirements contained in Section 220.22. This interpretation recognizes the industry practice of hiring temporary or seasonal workers, such as college students and military personnel, over Christmas holidays and periods of peak summer travel. These workers do not accrue any seniority rights, and their employment is terminable at will without recall rights. Because the Rehire Program is intended to facilitate the permanent reemployment of employees with a long-term commitment to the industry, the Department believes that coverage of seasonal and temporary em-

ployees and positions, so long as they do not confer seniority or recall rights, was not intended by the Act.

While air carriers are free to hire non-designated employees to fill seasonal or temporary positions, Section 220.20(b) prohibits an air carrier from filling a vacancy which would otherwise be available to a designated employee by promoting a seasonal or temporary employee until the carrier has made the vacancy available to designated employees in accordance with the regulations. Conversely, carriers which fill permanent jobs by selection from among their temporary or seasonal employees can maintain this practice by listing their temporary and seasonal positions with the Center established under these regulations and hiring designated employees to fill those positions.

It should also be noted that under the regulations the Rehire Program is applicable only to certain protected employees. A "designated employee" is defined in § 220.01(f) as a protected employee who meets certain statutory eligibility tests as set forth in § 220.10. Only designated employees are entitled to exercise the first-right-of-hire.

Subpart B prescribes the eligibility requirements for, as well as the rights of, designated employees under the Rehire Program.

Section 220.10 implements the statutory limitation that only designated employees are eligible for the first-right-of-hire. Specifically excluded from eligibility as designated employees are protected employees who retire, voluntarily quit, strike, or withhold services in support of other employees on strike.

Section 220.11 provides that designated employees shall have a first-right-of-hire, regardless of age, in their occupational specialty and also protects existing seniority and recall rights with their former air carriers. This section

additionally permits covered carriers to establish job qualifications or other hiring criteria which applicants must satisfy, subject to the limitations on such criteria set forth in § 220.21.

Subpart C enumerates the duties of covered air carriers under the Rehire Program.

Section 220.20 implements the statutory duty of covered air carriers to hire qualified designated employees before hiring any other applicant from outside the furloughed or existing work force of the hiring carrier. This section also explicitly recognizes a covered carrier's right to select the applicant of its choice from among the designated employees who apply for a given position.

Section 220.21 provides that, solely with respect to the Rehire Program, employment opportunities for designated employees may not be limited by a covered air carrier on the basis of initial hiring age, seniority or recall rights, or previous experience with another air carrier. This provision implements the express language of the Act that protected employees have a first-right-of-hire "regardless of age," thereby invalidating existing initial hiring age criteria of covered air carriers as they apply to designated employees in the Rehire Program.

Further, the Department believes that air carriers may not require the absence of seniority, recall rights or previous experience as a condition of employment for protected employees in the Rehire Program. However, these regulations are not intended to affect in any manner the hiring practices of covered air carriers regarding persons who are not designated employees or retirement policies of such carriers which do not discriminate against designated employees.

Section 220.22 provides that all certificated air carriers, including those certificated after the passage of the Act, must list their job vacancies with a Center established by

the Secretary which will maintain and publish a comprehensive listing of available airline jobs (See § 220.40). This requirement was established in order to ensure that the comprehensive listing contains a listing of all available jobs, even if some listed jobs are not subject to the express duty to hire imposed under the Rehire Program. In addition, the availability of such a comprehensive list should provide the maximum opportunity for unemployed airline workers to obtain reasonably comparable employment at the earliest possible time.

Section 220.23 prescribes the content of vacancy listings which must be filed by air carriers.

Section 220.24 prohibits covered air carriers from filling a vacancy (other than on a temporary basis) with anyone other than a designated employee until the vacancy has been listed with the Center, pursuant to § 220.22, for at least 30 days.

Section 220.25 establishes a list of protected employees to be published by the Department. Covered air carriers are required to report specific identifying information for all persons who qualify as protected employees. Additionally, air carriers are required to notify each employee who had an employment relationship with the carrier on the Trigger Date as to whether or not that employee is deemed a protected employee. It should be emphasized that the employer is not required to use any particular form in notifying employees as to whether or not they are protected. Thus, for example, the carrier is free to notify current employees of their status by placing a statement to that effect on their pay stub.

An employee whom the air carrier determines is not a protected employee may submit evidence in support of his or her claim to protected employee status to the air carrier, and, under procedures outlined in § 220.26, the employee or his or her representative may appeal any adverse final determination by the air carrier to the Secre-

tary. Any air carrier contemplating hiring a designated employee will be able to verify the employee's initial status as a protected employee by reviewing the list published by the Department.

Section 220.27 requires an air carrier to furnish each protected employee who is furloughed or terminated, other than for cause, during the ten years following the Trigger Date with appropriate written evidence that such employee is a designated employee at the time of such action. This requirement applies unless the furlough is for a specific period of less than 90 days. This requirement applies to all such furloughs or terminations between the effective date of the regulations and October 24, 1988. In addition, covered air carriers are required to make reasonable efforts to provide comparable evidence to protected employees who were furloughed or terminated by such carrier between October 24, 1978 and the effective date of the regulations.

Section 220.28 requires covered air carriers to make a semi-annual report of vacancies filled to the Department. For each vacancy filled by a non-designated employee, this report must contain a certification that no qualified designated employee filed a timely application.

Section 220.29 provides that a carrier under a specific EEO requirement emanating from a federal court or administrative order, consent decree, or conciliation agreement shall, to the extent possible, satisfy this obligation by hiring qualified designated employees. Where no such designated employees are available, the carrier may meet its EEO requirement by hiring nondesignated employees. The EEO obligation does not change a carrier's responsibility for following the hiring procedures established by this regulation.

Subpart D prescribes the obligations of designated employees in seeking to exercise the first-right-of-hire, including seeking suitable employment, making application for

specific positions with covered air carriers and providing proof of eligibility for the first-right-of-hire.

Subpart E prescribes the responsibilities of the Department of Labor under the Rehire Program.

Section 220.40 provides that the comprehensive list of jobs available with air carriers will be established and maintained at the Center established by the Secretary. Air carriers may list jobs with this facility by telephone or in writing. The comprehensive list of vacancies will be published on a periodic basis, probably weekly, or as determined necessary by the Secretary.

Section 220.41 provides for the list of protected employees to be published by the Department and circulated to covered carriers.

Subpart F prescribes the beginning and ending dates of the effective period of these regulations and provides for the disclosure of information, collected by the Department, consistent with the Privacy Act (5 U.S.C. 552a).

Enforcement

The Act and its legislative history are silent on the existence of a means to enforce the Rehire Program, whether by seeking damages for failure to carry out requirements of the Act or any accompanying regulations or otherwise. After careful study, the Department has concluded that it is without specific enforcement authority under the Act. However, it appears that a private right of action may be available to a qualified designated employee who actually applied for job vacancies. (See *Cort* v. *Ash*, 442 U.S. 66, 78 (1975).

Drafting Information

This document was prepared under the direction and control of Hugh Reilly, at the time, Executive Assistant to the Assistant Secretary for Labor-Management Relations.

Privacy Act

These regulations will create a system of records, which will include a list of protected airline employees, appeals and decisions on protected status, and reports of designated employees hired. The Department will publish in the Federal Register a notice of that system in accordance with section 552a(e)(4) of the Privacy Act.

Executive Order 12291

These regulations contain several provisions which entail economic costs for certificated air carriers and the Federal Government. In particular, these regulations establish: (1) Eligibility requirements and procedures for implementing the first-right-of-hire obligation established under the Act, (2) a comprehensive listing of airline job openings for all air carriers, including those certificated after the Trigger Date, (3) a list of protected employees to be published by the Department, (4) a one-time notice to all employees of covered carriers employed on the Trigger Date stating whether or not they qualify for protected status under the Act, (5) notices to furloughed and terminated employees, and (6) semi-annual reporting of any new hires to the Department, which includes certification for all jobs filled by someone other than a designated employee.

For several reasons the Department expects the actual economic impact of the regulations to be minimal. First, the essential element of the regulations—the duty to hire designated employees—is a statutory obligation, not one created by these regulations. Second, the program does not interfere with covered air carriers' internal promotion and recall practices for existing employees. Many job vacancies are filled internally through promotions of existing employees, while the Act and this rule are limited to outside hiring to fill job vacancies. This reduces substantially the number of actual job openings where first-right-of-hire provisions will apply. In addition, covered carriers

are entitled to recall their own furloughed or terminated employees prior to offering positions to designated employees. Finally, the regulations contain an exemption allowing carriers to hire temporary and seasonal employees without preference to covered workers so long as such workers are not subsequently granted seniority or recall rights, or given permanent employment. Thus the regulations will affect neither existing seniority, promotion, or layoff policies nor short-term hiring practices.

Additionally, the exemption of seasonal and temporary positions recognizes a prevalent practice in the industry and allows employers maximum flexibility in meeting work force requirements during peak demand periods. Several carriers indicated it is common practice to use temporary and seasonal jobs to test employees, who may then be offered permanent employment. Under this rule these airlines may continue this practice, provided the initial temporary and seasonal job offering give the same preference in hiring as would be given to permanent jobs under these rules. This option gives the airlines maximum flexibility in dealing with temporary and cyclical employment while still assuring the first-right-of-hire for permanent jobs.

A third reason the Department expects the economic impact of the regulations to be minimal is that the regulations recognize the right of covered carriers to impose their own qualifications and hiring criteria (subject to certain prohibitions) on job applicants and to freely select from among all designated employee applicants who possess the requisite qualifications. Thus, the regulations maintain existing employer personnel policies and job criteria intact, and they do not impose dual personnel systems for qualified designated employees and other applicants. The only change from present carrier practices is that they are required by the Airline Deregulation Act to give preference to qualified designated employees in any outside hiring.

Two costs stemming from the obligation to hire designated workers come from the statutory prohibition against age discrimination and the statutory guarantee of a worker's recall rights. The Department recognizes that covered air carriers may experience some increase training costs because of the statute's prohibition against age restrictions and the requirement which insures preservation of seniority and recall rights. Since investments in training are amortized over a number of years, employers incur higher training costs for short tenure workers, everything else being equal. The designated employee pool may have a shorter tenure horizon on average than other applicants because it includes some older workers close to retirement or those who may be recalled back to their previous employer with their seniority rights intact.

In addition, carriers have commented that hiring experienced employees sometimes involves certain costs of "untraining" and that some workers may find it difficult to adjust to the system of a new employer. Nevertheless, many carriers have found it beneficial to hire experienced, displaced employees. The skills and experience of these employees will offset the problems associated with hiring them.

The problem with worker recall rights is particularly troublesome for airlines with wage scales below those of the older established airlines. Workers may choose to hire on with a smaller airline in today's hard times, but may want to return to their old employer when the economy recovers and industry growth resumes. This puts a potential burden on the carriers hiring these employees, because they may go through a costly period of breaking in these employees only to lose them to their former employers. For this reason, these regulations permit any covered carrier to require designated employees to reveal the status of their recall rights when exercising their first-right-of-hire. While arguably this may reduce the attractiveness of a designated employee who has good prospects for recall

to his previous job, such a provision is necessary to allow these airlines to make informed hiring and personnel decisions with respect to designated employees. This policy will help reduce the costs of the program to carriers without undermining the basic protection afforded by the Act.

In sum, while the duty-to-hire obligation imposes some costs on employers, these regulations afford the carriers maximum flexibility in meeting this obligation. At the same time, workers are afforded their full rights as established by the Act. The Department concludes that its regulations defining the first right-of-hire impose no significant costs beyond those required by the Act.

The regulations detailing the administration of the program naturally impose some costs on the airlines. The principal administrative burdens placed on the airlines are: (1) The statutory requirement for all certificated airlines to list job vacancies, (2) a requirement that each covered carrier create a list of its protected employees, (3) a requirement that each covered carrier notify its protected employees of their protected status, (4) a requirement that each covered carrier notify furloughed and terminated workers of their rights and (5) a requirement that each covered carrier submit a semi-annual list to the Department of Labor of all new employees hired. These reporting requirements are the minimum necessary to administer the program, and to guarantee employees their rights under the Act.

The statute requires all certificated airlines to list available jobs with the Center established by the Department. Several commentators argued that only covered carriers should be required to list jobs, because the more recently certificated airlines have no duty-to-hire obligation. However, neither the express language of the statute nor the legislative history support such an interpretation, and indeed they suggest that a comprehensive list be provided about a broad range of job opportunities. The require-

ment for listing vacancies is a clear statutory obligation for all airlines holding a Section 401 certificate.

In practice, the requirement for a listing will impose minimal costs in most hiring circumstances. First, the job listing generally requires only nine pieces of information. Thus each listing will be easy to prepare. In addition, a number of openings may be covered by a single job listing. For example, a single listing may solicit applicants for 20 flight attendant openings. Second, the rule allows employers to list job vacancies entirely by telephone, rather than through written job orders. This increases the efficiency of the job listing program and reduces unnecessary employer delays in filling job vacancies. Third, while the rules prescribe a minimum "waiting period" for each listing, a carrier must abide by this waiting period only if it hires a non-designated employee. The purpose of the waiting period is to assure that designated employees have the opportunity to exercise their rights, and it would be needlessly burdensome to require employers to wait out the listing period before hiring a designated employee. Thus, for example, carriers may retain applications of designated employees on file, and hire them at the same time they file the vacancy with the Center.

Even in cases when the carrier must wait 30 days, this requirement is not always burdensome. For example, the larger airlines generally hire entire classes of employees rather than isolated individuals. This type of hiring decision takes place well in advance, at which time employers may list the anticipated vacancies. Similarly, under negotiated union contracts many jobs must be bid to existing employees for a period of time before outside hiring can take place. These listings may be placed simultaneously with internal bidding procedures.

Finally, the listing of jobs with the Center is not without benefits. The national listing of openings and list of protected employees will increase the efficiency of the

labor market in the airline industry by facilitating the matching of job vacancies with qualified applicants.

The remaining administrative requirements are not specifically required by the statute, but are held to be the minimum necessary to ensure the effectiveness of the first-right-of-hire and job listing programs. First, each covered carrier is required to submit to the Secretary a list of protected employees who were employed by that carrier at the time of deregulation. The Department had considered an alternative to such a list under which each individual had to declare his or her protected status whenever he or she asserted the first-right-of-hire, with this declaration subject to confirmation by the former employer. This alternative may be less expensive for any small airline which may not have automated employment records. However, several of the smaller carriers, which received their certificates shortly before deregulation have no protected employees and are not subject to this provision. And for many of the bigger airlines, the one-time generation of a master list of protected employees may be the most efficient alternative.

However, apart from the issue of costs, the overriding consideration in requiring a list was to assure that protected employee status is ascertained while employment records are still relatively current. This will avoid the costs of having to confirm employment records potentially ranging back 10 or more years in the later years of the program. In addition, requiring the list at the outset of the program assures that employment records will not be wiped out by any future bankruptcies or mergers of covered airlines. Therefore, while this alternative imposes higher initial costs than the case-by-case treatment, in the long run it may cost the same or less, and it will assure a much more effective administration of the program in the later years.

The requirement that covered carriers notify potentially protected employees (those with an employment relation-

ship on October 24, 1978) of their protected status also is not a statutory requirement, but the Department considers it a necessary one if the program is to operate effectively. The employees so notified would know that they are protected or, at a minimum, they would know that they met one of the two criteria necessary for protected status. Those deemed not protected would then also be informed of the appeal rights available to them. Carriers could easily accomplish this notice on pay stubs or on other forms of internal communication for current employees. Similarly, notices of rights required by § 220.27 can be given to employees already furloughed along with the notices of protected status. Workers furloughed after the regulations become effective can receive notices of rights along with their separation papers.

The other requirement is that each covered carrier submit a semi-annual list of new employees hired (excluding recalls). While the precise costs of these reporting requirements cannot be estimated because the number of jobs to be filled through outside hiring is not known, they are expected to be minimal.

The cost to the Federal Government to establish the Center and to publish a minimum number of job vacancies would be $22,000 per year. If vacancies in the industry occurred at the same rates they occurred in the 1970's, the cost would be about $100,000 per year.

The increased administrative costs imposed on air carriers and the Federal Government as a result of the job listing program and the filing and processing of one-time notices and semi-annual reports will not be major. While the precise costs on air carriers cannot be estimated, the flexibility given to carriers to meet these requirements and the existence of automated personnel files for most of the carriers should reduce the costs to a minimum.

In conclusion, the Department has determined that this rule does not meet the tests for a "major rule" under

Executive Order 12291. These rules carry out the statutory mandate of the Airline Deregulation Act to put the first-right-of-hire program into place, and they do so without expanding the scope of the program beyond the intent of Congress. The economic impact of these rules for implementing the first-right-of-hire program is substantially below the threshold for designation as a "major rule" by the Office of Management and Budget. It is not likely to result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in cost or prices for consumers, individual industries, federal, state or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign based enterprises in domestic or export markets. Accordingly, no regulatory impact analysis is required.

Paperwork Reduction Act

The Department has sought to keep paperwork requirements to that minimum which would be necessary to secure the rights of protected employees. The regulation requires covered air carriers to: (1) Develop a list of their protected employees, (2) send notices of possible protected status, (3) send notices of furloughs and terminations and (4) file semi-annual reports on their hiring. In addition, all air carriers would also list job vacancies to create a comprehensive list of the industry. The latter provision is a direct statutory requirement, which can be accomplished by telephone.

Several commentators objected to the costs of preparing the list of protected employees and the notices. We believe, contrary to their assertions, that the existence of automated data systems will make the costs low. In any event, the alternative of verification of protected status at the time of a prospective hire could ultimately be more costly and less effective. The Department received no specific comments on the reporting requirements.

In accordance with the Paperwork Reduction Act of 1980 (Pub. L. 96-511), the information collection requirements that are included in this regulation have been submitted for review to the Office of Management and Budget. They are not effective until OMB approval has been obtained and the public notified to that effect through a technical amendment to this regulation.

Regulatory Flexibility Act

As indicated in the notice of proposed rulemaking, the Department finds that these regulations do not have a "significant economic effect upon a substantial number of small entities."

This is true both because the regulations do not impose substantial costs beyond those required by the Act, and because the costs fall to a large degree on large establishments. Contrary to the suggestions of several commentators, Congress gave no indication that distinctions should be drawn among the different certificated airlines. In addition, as noted already in this preface, the regulations afford maximum flexibility to airlines to prelist prospective positions and to take whatever other steps may reduce their costs of complying with the first-right-of-hire program. The reporting requirements generally are proportional to the number of employees affected, and therefore will not disproportionately burden the smaller carriers. In addition, several of the small carriers do not have protected employees, and they will not incur the costs of creating lists and notifying employees.

In addition, most of the covered carriers are large entities whether the definition of small entity is based upon annual revenues, or, as some commenters suggested, the definition is based upon employment or upon the kind of aircraft operated by the airline. In the notice of proposed rulemaking it was indicated that four of the carriers affected have gross annual revenues of under $10 million. In terms of employment, 19 of the carriers have fewer than 1,000 employees. In terms of aircraft type,

if the 60-seat/18,000 pound payload standard is used, only seven carriers would be small businesses. Hence, these regulations do not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

Regulatory Flexibility Act Certification

I, William E. Brock, Secretary of Labor, hereby certify, pursuant to 5 U.S.C. 605(b) that the final rule published hereinafter (29 CFR Part 220), for the Airline Employee Protection Program, will not have a significant economic impact on a substantial number of small entities. This conclusion is reached because this rule only has a minimal economic impact on a limited number of small air carriers certificated under section 401 of the Federal Aviation Act of 1958.

Signed at Washington, D.C. this 23rd day of December 1985.

Secretary of Labor.

List of Subjects in 29 CFR Part 220

Labor, Airline employees, Air carriers.

Accordingly, a new 29 CFR Part 220 is added to read as set forth below.

Signed at Washington, D.C. this 23rd day of December 1985.

William E. Brock,
Secretary of Labor.

PART 220—AIRLINE EMPLOYEE PROTECTION PROGRAM

Subpart A—Purpose and Scope of the Airline Employee Protection Program

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220.30 Designated employees' responsibilities.

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Appendix I—U.S. carriers certificated as of October 23, 1978 under Section 401 of the Federal Aviation Act of 1958, as amended.

Authority: Section 43(f) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1750-1753 (49 U.S.C. 1552) (Secretary's Order No. 1-79, 44 FR 13093; Secretary's Order No. 3-84, 49 FR 29578).

Subpart A—Purpose and Scope of the Airline Employee Protection Program

§ 220.01 Definitions.

As used in this Part, unless the content otherwise indicates:

(a) "Act" means the Airline Deregulation Act of 1978, Public Law 95-504, 92 Stat. 1705.

(b) "Air Carrier" means an air carrier certificated under Section 401 of the Federal Aviation Act of 1958 (49 U.S.C. 1371).

(c) "Center" means the entity or location which from time to time may be designated by the Secretary to receive, maintain and distribute the job listing information required by this Part.

(d) "Corporate officer" means an individual who holds any officer's position established pursuant to the Articles of Incorporation or bylaws of any air carrier, or who is otherwise identified as an officer by any air carrier, in filings with the Federal Aviation Administration, Civil Aeronautics Board or Securities and Exchange Commission or in any reports to stockholders or any public communications of an air carrier.

(e) "Covered air carrier" means an air carrier which was certificated prior to October 24, 1978 (A listing of such carriers appears as an appendix to these regulations).

(f) "Designated employee" means a protected employee who meets the eligibility requirements set forth in Section 220.10.

(g) "Effective period" means the period commencing on the effective date of these regulations and ending on the later of: (1) October 23, 1988, or (2) the last day of the final month in which the Secretary is required to make a payment under Section 43 of the Act; except that nothing in these regulations shall preclude the exercise of statutory rights and duties between October 24, 1978, and the effective date of these regulations.

(h) "Eligibility period" means the ten-year period beginning on October 24, 1978.

(i) "Employment relationship" means an attachment to a covered air carrier which includes, but is not limited to, compensated service, furlough, leave, or strike.

(j) "Equal employment opportunity requirement" means a specific equal employment requirement, pursuant to a federal court or administrative order, consent decree, or conciliation agreement, requiring that named individuals or specific members of a class are entitled to relief by virtue of the carrier's unlawful employment discrimination.

(k) "Occupational specialty" means the class, craft, or field of endeavor in which an individual was employed at the time of separation from a covered air carrier or in which the employee was employed during the 12 months immediately preceding the date of separation.

(l) "Protected employee" means a person other than a member of the Board of Directors or corporate officer of a covered air carrier:

(1) Who had an employment relationship with a covered air carrier on October 24, 1978, and

(2) Who on October 24, 1978, had four years of employment or four years accrued seniority with a single covered air carrier. The term employee shall include any full or part-time employee other than an employee in seasonal or temporary employment as defined herein. As

used herein four years of employment shall mean not less than 48 months (whether or not consecutive) in which the employee actually completed the minimum number of hours of regular employment required for such employee's craft, class or position under the then applicable requirements of the employing carrier.

(m) "Seasonal employment" means employment during limited periods of the year due to peak market conditions or other factors which are periodic in nature, and in positions which do not confer seniority or recall rights.

(n) "Secretary" means the Secretary of Labor of the United States.

(o) "Temporary employment" means employment of limited duration which does not confer seniority or recall rights.

(p) "Terminated" means, unless expressly provided to the contrary, termination of employment, other than for cause.

(q) "Terminated for cause" means the separation of an individual from employment initiated by an air carrier for violation of such carrier's rules, policies, procedures, or practices pertaining to employee standards of conduct, job performance, or dependability.

(r) "Vacancy" means an employment opportunity other than seasonal or temporary employment, which an air carrier seeks to fill from outside its existing or furloughed work force.

§ 220.02 Purpose.

Section 43(d) of the Act provides a first-right-of-hire for designated employees of covered air carriers. The regulations in this Part are issued to effectuate section 43(d)(1) and (2) of the Act (hereinafter referred to as the Rehire Program).

§ 220.03 Scope.

(a) The Rehire Program is applicable only to designated employees, as more fully set forth herein, and only those employees who are expressly granted a hiring preference under the Act and these regulations have any rights under the Rehire Program. The Secretary of Labor will also publish a comprehensive list of jobs available with air carriers.

§ 220.04 Responsibilities of the Secretary of Labor.

The Secretary of Labor is responsible for administering the Rehire Program, and the Deputy Under Secretary for Labor-Management Relations and Cooperative Programs, Bureau of Labor-Management Relations and Cooperative Programs (BLMRCP) has been delegated responsibility for the following:

(a) The development and promulgation of policies, regulations and procedures covering the first-right-of-hire provisions of Section 43(d)(1) of the Act;

(b) The development and promulgation of policies, regulations and procedures covering the comprehensive job list required under Section 43(d)(2) of the Act; and

(c) The establishment and implementation of reporting requirements for air carriers to obtain pertinent information necessary for fulfilling the Secretary's responsibilities under Section 43(d)(2) of the Act.

Subpart B—Designated Employees' Eligibility and Rights

§ 220.10 Eligibility requirements.

(a) To qualify as a designated employee eligible for rights under this Part 220, an applicant must be a protected employee who is involuntarily placed on furlough or is terminated by a covered air carrier during the eligibility period.

(b) A protected employee shall not be deemed to be furloughed or terminated if such employee:

(1) Retired voluntarily;

(2) Was required to retire by virtue of reaching the mandatory retirement age, if any, established by a covered air carrier or as prescribed by any government agency with regulatory authority over a covered air carrier;

(3) Retired due to a disability;

(4) Is on strike or is withholding services in support of other employees who have struck the covered air carrier;

(5) Is terminated for cause as defined in § 220.01;

(6) Resigned or voluntarily quit for any reason.

(c) A designated employee who is recalled by his former carrier is no longer eligible under this section to exercise the first-right-of-hire. Such a person may become a designated employee in the future due to a subsequent termination or furlough which occurs on or prior to the expiration of the eligibility period.

§ 220.11 Designated employees' rights.

(a) A designated employee shall have a first-right-of-hire in such employee's occupational specialty, regardless of age, with any covered air carrier hiring additional employees; *Provided, however,* That each designated employee must satisfy all qualifications or other requirements established by the hiring carrier (subject to the limitations contained in Section 220.21) and must make a timely application in accordance with normal carrier procedures for any particular job vacancy.

(b) A designated employee hired by any covered air carrier pursuant to the provisions of the Act shall not be required, as a condition of employment, or in any other manner, to relinquish, waive, or forfeit any seniority or recall rights which such person may possess with any other air carrier; *Provided, however,* That the provisions

of this part shall not be deemed to create or prolong any such seniority or recall rights.

Subpart C—Carriers' Responsibilities

§ 220.20 Duty to hire.

(a) Subject to § 220.24, a covered air carrier shall have the duty to hire a designated employee, regardless of age, who otherwise meets the qualification requirements established by such carrier before it hires any other applicant when such carrier is seeking to fill a vacancy in the designated employee's occupational specialty from outside its work force. As used herein "work force" shall include all present employees and any furloughed or terminated employees who, at the time of furlough or termination, possessed recall or seniority rights.

(b) Subject to the provisions of § 220.24, a covered air carrier shall not fill a vacancy, which would otherwise be available to a designated employee, by promoting or reassigning a seasonal or temporary employee, *unless* such seasonal or temporary employee is a designated employee.

(c) When considering applications from more than one designated employee for a particular vacancy, a covered air carrier shall be entitled to offer employment to any such designated employee in its absolute discretion.

§ 220.21 Criteria for Employment.

(a) A covered air carrier shall be entitled to apply any prerequisites or qualifications determined by it for any vacancy, except that, solely with respect to the duty to hire created by the Act, a covered air carrier shall not be entitled to limit employment opportunities for designated employees on the basis of:

(1) Initial hiring age (provided that such prohibition shall not be applicable to retirement ages applicable to all of any class or craft of such air carrier's employees); or

(2) The existence of any seniority, recall rights or previous experience with any other air carrier; *Provided, however,* That covered air carriers shall be entitled to require prospective employees to disclose the existence of any such seniority or recall rights in making application for employment and to take the existence or nonexistence of such rights into account in selecting from among those qualified designated employees who have applied for a particular job vacancy.

(b) In filling job vacancies during the effective period, covered air carriers shall be entitled to require applicants to furnish evidence that they are designated employees.

§ 220.22 Listing a vacancy.

(a) During the effective period all air carriers shall be required to list each vacancy with the Center at the earliest practicable time, and to include with such listing a statement as to whether the carrier is subject to an equal employment opportunity requirement, as defined in these regulations, in filling the vacancy. In addition, any air carrier shall be entitled to list anticipated vacancies with the Center at any time.

§ 220.23 Content of vacancy listing.

Air carriers shall provide the Center with a description for each job listing, which shall include, but need not be limited to, the following—

(a) Job title;

(b) Type of position (full or part-time);

(c) Salary;

(d) Basic qualifications and/or training requirements;

(e) Brief description of duties;

(f) Location of vacancy (if known);

(g) Special requirements such as type rating, licensing, skill requirements, etc.;

(h) Whether the vacancy is subject to the duty to hire;

(i) Information on how to apply, such as contact person, mailing address, and any special application procedures; and

(j) Whether the carrier is subject to an equal employment opportunity requirement, as defined in these regulations, in filling the vacancy.

(Approved by the Office of Management and Budget under OMB Control Number 1214-0002.)

§ 220.24 Filling a vacancy.

(a) A covered air carrier may fill a vacancy with a designated employee at any time after a vacancy has been listed with the Center.

(b) A covered air carrier may fill a vacancy with someone who is not a designated employee after the vacancy has been listed with the Center for at least 30 days; if

(1) No designated employee with the requisite occupational specialty has applied for the vacancy in accordance with § 220.30 within that time;

(2) No designated employee who did apply within that time period meets the carriers' criteria for employment as set forth in § 220.21; or

(3) The vacancy is subject to an equal employment opportunity requirement and the carrier cannot satisfy such equal employment opportunity requirement by hiring a designated employee.

(c) A covered air carrier may fill a vacancy on a temporary basis with someone who is not a designated em-

ployee while the carrier is considering applications for the vacancy which were received from designated employees during the listing period.

(d) The date of the listing shall be the date on which the listing is received by the Center.

§ 220.25 List of protected employees.

(a) Within 60 calendar days of the effective date of these regulations, each covered air carrier shall provide the Secretary with a list of all protected employees who were employed by it on October 24, 1978.

(Approved by the Office of Management and Budget under OMB Control Number 1214-0002.)

(b) The list shall contain the following information:

(1) Protected employee's name;

(2) Social Security number (if available); and

(3) Current occupational specialty for present employees or occupational specialty at the time of separation from employment for former employees.

(c) Not later than 90 calendar days after the effective date of these regulations, each covered air carrier shall provide a onetime notice to each employee with an employment relationship with the carrier on October 24, 1978, stating whether or not the carrier has determined that employee to be a protected employee within the meaning of these regulations, and if so that the carrier has reported his or her name to the Secretary. Employees who are determined to be not protected shall be advised of their rights to appeal.

(2) Employees who dispute the carrier's determination of protected status may submit evidence of their status to the covered air carrier within 60 calendar days of receiving the notice required by paragraph (c)(1).

(3) The covered air carrier shall consider the evidence submitted by the employee and shall inform the employee of its final determination within 15 calendar days of the submission of evidence. In the event the carrier determines that the employee qualifies as a protected employee, it shall forward the information required by paragraph (b) of this section to the Secretary.

§ 220.26 Appeals to the Secretary.

(a) If the employee disagrees with the carrier's final determination under § 220.25 that he or she is not a protected employee within the meaning of this part, the employee (or his or her designated representative with express authorization) may appeal such determination to the Secretary within 60 calendar days of the carrier's final decision under § 220.25(c)(3) or the date when such decision was required.

(b) An appeal must be written, dated, and signed by the employee. It must set forth:

(1) The full name, address, and telephone number of the employee;

(2) The full name and address of the carrier making the determination; the full name of the individual(s) who made the determination for the carrier and the date of that determination;

(3) A summary of the pertinent events and circumstances concerning the employee's status and the basis of the disagreement, including the original date of hire, date of all periods of furlough, leave or termination, and copies of relevant documents; and

(4) Such other information as may be required by the Secretary.

(c) Any appeal hereunder may be filed with the Airline Employee Protection Program, Bureau of Labor-

Management Relations and Cooperative Programs, Room N-5416, 200 Constitution Avenue, NW., Washington, DC 20210.

(d) (1) Upon receipt of an appeal, the Secretary will request information from the parties or conduct such other investigation as may be required.

(2) Upon review of the entire record, the Secretary shall determine either that—

(i) The employee qualifies for protected status, and the Secretary shall add the employee's name to the list of protected employees and so notify the parties; or

(ii) The employee does not qualify for protected status and so notify the parties.

§ 220.27 Notice of Rights.

(a) Not later than the date of separation from employment, a covered air carrier which furloughs or terminates a protected employee during the eligibility period, unless such furlough is limited to a specific period of less than 90 calendar days, shall furnish such protected employee with a notice of rights in the form of a letter or other written documentation that such employee is a designated employee and thereby is entitled to exercise a first-right-of-hire. Such notice of rights shall include, but not be limited to, the following information:

(1) Name;

(2) Social Security number (if available);

(3) Occupational specialty;

(4) Date of furlough or termination;

(5) An official of the covered air carrier who can verify the individual's status as a designated employee; and

(6) Signature, name, and location of the certifying official.

(b) As soon as practicable, but not later than 60 calendar days following the effective date of these regulations, each covered air carrier shall make a reasonable effort to provide the notice or rights required in paragraph (a) of this section to any designated employee who was furloughed or terminated by such carrier on or after October 24, 1978, and prior to the effective date of these regulations and who has not been recalled to employment by such covered air carrier.

(c) A covered air carrier shall provide a verified true copy of the notice of rights to a designated employee who has lost his or her original copy.

(Approved by the Office of Management and Budget under OMB Control Number 1214-0002.)

§ 220.28 Air carrier actions to be reported to the Secretary.

(a) A covered air carrier shall report to the Secretary:

(1) The names and Social Security numbers (if available) of all designated employees hired by it, and

(2) The filling of any vacancy with other than a designated employee.

With respect to any occurrences reported under paragraph (a) (2) of this section, the report of the covered air carrier shall contain the job order number assigned to that vacancy by the Center, the date of hire, and a certification by a corporate officer that the carrier complied with the provisions of this part and that no qualified designated employee with the requisite occupational specialty applied in a timely manner.

(b) Two copies of the reports required by this section shall be filed with the Secretary covering the six-month periods ending June 30 and December 31 of each calendar year in which these regulations are in effect and shall be

submitted within 60 calendar days of the end of the reporting period.

(Approved by the Office of Management and Budget under OMB Control Number 1214-0002.)

§ 220.29 Equal Employment Opportunity.

(a) Where a covered air carrier is under an equal employment opportunity requirement, the covered air carrier shall, to the extent possible, satisfy this equal employment obligation by hiring qualified designated employees.

(b) Where a covered air carrier is under an equal employment opportunity requirement and cannot satisfy such requirement by hiring from the pool of qualified designated employees, the carrier may meet its equal employment requirement by hiring non-designated employees. *Provided, however,* That this provision shall not change or reduce the responsibilities of carriers in regard to the hiring procedures required by §§ 220.21, 220.22, 220.23, and 220.24.

Subpart D—Designated Employees' Responsibilities

§ 220.30 Designated employees' responsibilities.

It is the responsibility of each designated employee to:

(a) Make application to any covered air carrier for whom the designated employee desires to work in the time and manner required by such carrier.

(b) To insure that an application previously submitted to a covered air carrier which currently lists a vacancy is in an active status so as to be considered for such vacancy;

(c) To provide a copy, if requested, of the notice of rights to a potential employing air carrier; and

(d) To retain the original notice of rights for future use.

Subpart E—Department of Labor's Responsibilities

§ 220.40 Comprehensive job list.

(a) The Secretary shall establish a Center to maintain a comprehensive listing of all vacancies listed by air carriers in accordance with §§ 220.22 and 220.23.

(b) The Center will be accessible by telephone throughout the United States to facilitate the listing or modifying of vacancy information by air carriers.

(c) The Center shall provide an air carrier with an identifying number for each vacancy listed on the comprehensive listing.

(d) The comprehensive listing shall be compiled, published and distributed to each local office of the State Employment Security Agencies on a periodic basis as determined necessary by the Secretary, and it shall be distributed to such other individuals or organizations as may desire to receive copies thereof in accordance with criteria established by the Secretary from time to time.

§ 220.41 List of protected employees.

The Secretary shall establish and publish a list of protected employees as reported by covered air carriers under § 220.25. A copy of this list shall be sent to all covered air carriers as soon as available.

Subpart F—Administration

§ 220.50 Effective period of the program.

(a) *Beginning date.* (1) The requirements set forth in this part shall be effective thirty (30) days after publication in the Federal Register.

(b) *Ending date.* This program and these regulations terminate on the last day of the effective period.

(c) Nothing in this Part shall affect the rights and duties of protected employees and covered air carriers under the Act prior to the effective date of this part.

§ 220.51 Disclosure of information.

The Department of Labor shall make available to covered air carriers and to designated employees or their authorized representatives, all reports, certifications, or lists collected under this Part, to the extent permitted by the Privacy Act (5 U.S.C. 552a) and the Department's regulations issued pursuant to that Act (29 CFR Part 70a).

Appendix I—U.S. Carriers Certificated as of October 23, 1978, Under Section 401 of the Federal Aviation Act of 1958, as Amended

(Annotations Reflect Operating Status as of December 2, 1985.)

1. Airlift International, Inc.
2. Air Micronesia, Inc.
3. Air Midwest
4. Air New England, Inc.*
5. Air Wisconsin, Inc.
6. Alaska Airlines, Inc.
7. Allegheny Airlines, Inc. (*2*)
8. Aloha Airlines, Inc.
9. American Airlines, Inc.
10. Aspen Airways, Inc.
11. Braniff Airways, Inc. (*1*)
12. Capitol International Airways, Inc.*
13. Chicago Helicopter Airways, Inc.*
14. Colonial Airlines, Inc.*
15. Continental Air Lines, Inc.
16. Delta Air Lines, Inc.
17. Eastern Airlines, Inc.
18. Evergreen International Airlines, Inc.
19. The Flying Tiger Line, Inc.
20. Frontier Airlines, Inc.
21. Hawaiian Airlines, Inc.
22. Hughes Air Corp.* (*4*)
23. Kodiak Western Alaska Airlines, Inc.*

24. Mackey International Airlines, Inc.*
25. McCulloch International Airlines, Inc.
26. Midway Airlines, Inc.
27. Midway (Southwest) Airways Co.*
28. Modern Airways, Inc. (*1*)
29. Munz Northern Airlines, Inc.*
30. National Airlines, Inc.* (*5*)
31. New York Airways, Inc.*
32. North Central Airlines, Inc.* (*4*)
33. Northwest Airlines, Inc.
34. Overseas National Airways, Inc.* (*6*)
35. Ozark Air Lines, Inc.
36. Pan American World Airways, Inc.
37. Piedmont Aviation, Inc.
38. Reeve Aleutian Airways, Inc.
39. Rich International Airlines, Inc. (*1*)
40. Seaboard World Airways, Inc.* (*7*)
41. Southern Air Transport, Inc.
42. Southern Airways, Inc.* (*4*)
43. Texas International Airlines, Inc. (*8*)
44. Trans International Airlines, Inc. (*9*)
45. Trans World Airlines, Inc.
46. United Airlines, Inc.
47. Western Air Lines, Inc.
48. Wien Air Alaska, Inc.
49. World Airways, Inc.
50. Wright Air Lines, Inc.
51. Zantop International Airlines, Inc.

*No longer holds certificate.

(*1*) Holds certificate, but not operating.

(*2*) Renamed U.S. Air, Inc.

(*3*) Renamed Capitol Air, Inc.

(*4*) Merged into Republic Airlines, Inc.

(*5*) Merged into Pan American World Airways, Inc.

(6) Ceased operation in September 1978. United Air Carriers, Inc., dba National Airlines and dba Overseas National Airways, may be a successor.

(7) Merged into Flying Tiger Line, Inc.

(8) Merged into Continental Airlines.

(9) Renamed Transamerica Airlines, Inc.

Note.—This appendix will appear in the Code of Federal Regulations.

[FR Doc. 85-30644 Filed 12-26-85; 8:45 am]

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APPENDIX F

The following is a list of parent companies, subsidiaries (except wholly owned) and affiliates of petitioners, pursuant to Supreme Court Rule 28.1:

Air Cal
Alaska Air Group, Inc.
AMR Corporation
Capitol Air Sales, Inc.
Air Reservations, Inc.
Tiger International, Inc.
Skyvoyager Air, Inc.
Tiger Trading Company
Flying Tiger Air Services, Inc.
SWAP, Inc.
Montana Enterprises, Inc.
Tomisato Shoji Kabuskiki Kaisha
Affiliated Enterprises, Inc.
Norfolk Southern Corporation
Air Services, Inc.
Aviation Supply Corporation
NWA, Inc.
Northwest Aircraft, Inc.
Gatwick Handling, Ltd.
Compas 315, Ltd.
Ozark Airlines, Inc.
Ozark Holdings, Inc.
Allegis Corporation
Hertz Corporation
Mauna Kea Properties, Inc.
Westin Hotel Company
Hilton International Co.
GAB Business Services, Inc.
UAL Capital Corporation
146 Haynes Corporation
Olohana Corporation
Mileage Plus, Inc.
E & T Trading Corporation

United Airlines Capital Corporation
United Airlines Credit Corporation
United Airlines Aircrew Training, Inc.
United Airlines B.V.
United Airlines S.A. de C.V.
United Vacations, Inc.
UAL Leasing, Inc.
Contingency Corporation
Dempster Properties
J & N Trading Corporation
The Linneman Corporation
United Airlines Space Technologies
USAir Group, Inc.
Henson Aviation, Inc.
JJF Investments, Inc.
WAL Communication, Inc.
Pacific Southwest Airlines
Jet America, Inc.

(2)

Supreme Court, U.S.
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No. 87-49

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALASKA AIRLINES, INC., ET AL., PETITIONERS

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners, 11 airlines certificated by the Civil Aeronautics Board (CAB) prior to the enactment of the Airline Deregulation Act of 1978 (the Deregulation Act), Pub. L. No. 95-504, 92 Stat. 1705, challenge the "duty to hire" provisions contained in the Act, 49 U.S.C. App. 1552, and the regulations promulgated thereunder, 29 C.F.R. Pt. 220. The duty to hire provisions generally require previously-regulated air carriers to give hiring preferences to certain employees who were terminated or furloughed within the ten-year period following October 24, 1978, the effective date of the Deregulation Act. Petitioners contend that the duty to hire provisions violate their Fifth Amendment rights to due process and equal protection.

1. In 1978, Congress decided that "[t]he time ha[d] come for a major change and fundamental redirection as to the manner of regulation of interstate and overseas air transportation so as to place primary emphasis on competition" (S. Rep. 95-631, 95th Cong., 2d Sess. 52 (1978)).

Enacting the Deregulation Act, Congress jettisoned the industry-wide fare structure previously enforced by the CAB and substantially altered the procedures by which airlines could enter new markets (49 U.S.C. App. 1371(c) and (d), 1482(d)). It also abolished the licensing power of the CAB as of 1981, and, effective in 1984, eliminated the CAB altogether (49 U.S.C. App. 1551(a)(1)(A) and (3)). See *Alaska Airlines, Inc.* v. *Brock,* No. 85-920 (Mar. 25, 1987), slip op. 1-2.

Congress determined, however, that airline deregulation should involve a "gradual and phased transition" (H.R. Conf. Rep. 95-1779, 95th Cong., 2d Sess. 56 (1978)), and it expressed its resolve to "insure that the benefits to the public which result from its decision to alter substantially the regulation of air transportation * * * not [be] paid for by a minority—the airline employees and their families who have relied on the present system" (S. Rep. 95-631, *supra,* at 114). It therefore provided a statutory Employee Protection Program (EPP), enacted as Section 43 of the Deregulation Act (49 U.S.C. App. 1552), to assist dislocated employees.

The EPP as enacted had two parts. The first part, which has not been funded by Congress and thus has not become operative, see *Alaska Airlines,* slip op. 2-3, provides for monthly payments and relocation assistance to persons who had been employed by airlines for at least four years ("protected employees") and who lost their jobs or much of their income because of deregulation (§ 43(a)-(c), (e), and (h) of the Deregulation Act, 49 U.S.C. App. 1552(a)-(c), (e), and (h)). The second part of the EPP imposes on airlines certificated under the prior regulatory system "a duty to hire [protected employees] before they hire any other person" (§ 43(d)(1), 49 U.S.C. App. 1552(d)(1)). Under this provision, if any such "protected employee" is "furloughed or otherwise terminated" other than for cause within the ten years after October 24, 1978,

a carrier covered by the section is obligated to hire him, "in his occupational specialty," before it may hire any other job applicant to fill the position (except that the hiring carrier may first hire any of its own previously furloughed employees) (49 U.S.C. App. 1552(d)(1)).

2. Petitioners brought this action in the district court, initially challenging the constitutionality of the EPP's legislative veto provision, which provided an opportunity for Congressional review and disapproval of implementing regulations proposed by the Secretary (49 U.S.C. App. 1552(f)(3)).[1] Petitioners contended, moreover, that the balance of the EPP was inseverable from the veto provision and could not be sustained if the veto were struck down. The district court agreed with petitioners and invalidated the entire EPP. *Alaska Airlines, Inc.* v. *Donovan,* 594 F. Supp. 92 (D.D.C. 1984). The court of appeals reversed, finding the legislative veto to be severable, and remanded the case to the district court for consideration of petitioners' remaining challenges to the EPP and the regulations promulgated thereunder. *Alaska Airlines, Inc.* v. *Donovan,* 766 F.2d 1550 (D.C. Cir. 1985). This Court thereafter unanimously affirmed the decision of the court of appeals. *Alaska Airlines, Inc.* v. *Brock, supra.*

3. On remand from the court of appeals, the district court sustained all but one of the Secretary's regulations (Pet. App. 6a-18a).[2] Relying on the language and

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[1] Section 43(f)(1) of the statute authorizes the Secretary to "issue, amend, and repeal such rules and regulations as may be necessary for the administration" of the EPP (49 U.S.C. App. 1552(f)(1)). Pursuant to that authority, the Secretary issued final regulations in 1983 and again in 1985. See 50 Fed. Reg. 53093 (1985) (codified at 29 C.F.R. Pt. 220).

[2] The sole exception was a portion of 29 C.F.R. 220.21 dealing with the initial hiring age of flight officers and pilots. The district court invalidated this provision and remanded for further explanation by the

legislative history of the EPP, the district court first rejected (*id.* at 8a-11a) the argument that the Secretary 's regulations were overbroad in that they covered employees who were terminated for reasons unrelated to the deregulation of the airlines. The court explained (*id.* at 11a-12a) that "[t]he duty to hire in § 43(d) [49 U.S.C. App. 1552(d)] is without qualification and there is no indication that Congress delegated any authority to the Department of Labor to limit eligibility or create a system to determine which terminations are due to deregulation." Moreover, the court held (*id.* at 12a) that the decision "to adopt a broad definition of the duty to hire" is not unconstitutional, even though it "may create a burden for the Airlines," since the evidence before Congress demonstrated that "there [i]s no way to determine which employees [are] victims of general business circumstances and which [are] victims of regulatory reform" (*ibid.* (footnote omitted)). Finally, the court rejected the claim (*id.* at 13a-14a) that the Secretary's regulations violate due process and equal protection because they impose the duty to hire only on airlines that were certificated by the CAB prior to the deregulation. The court observed (*ibid.* (citation omitted)) that "[a]t the time the Deregulation Act was passed Congress believed that regulated carriers had been the beneficiaries of a system which protected them from competition, resulting in more costly and less efficient service to consumers. Congress decided that the beneficiaries of regulation should bear the burden of displacements that might occur as a result of deregulation."[3]

Secretary. Pet. App. 15a-16a. The court of appeals subsequently reversed this judgment and sustained the regulation (*id.* at 4a).

[3] The district court also rejected several claims that the Secretary's regulations were inconsistent with petitioners' safety (Pet. App. 14a-17a) and equal employment opportunity obligations (*id.* at 17a-18a), and that the regulations "upset the delicate employer-

4. The court of appeals, in an unpublished memorandum, unanimously affirmed the decision of the district court, except as to two issues not presently before this Court (Pet. App. 1a-5a).[4] The court found the Secretary's regulations to be "clearly reasonable, consistent with the terms of the [Deregulation] Act, and within the Secretary's statutory authority" (*id.* at 3a). And rejecting petitioners' constitutional claims as "without merit" (*ibid.*), the court explained (*id.* at 3a-4a) that "Congress' decision to place certain of the burdens of airline deregulation solely on the previously-regulated carriers satisfies the standard of rationality that applies to economic regulation."

5. The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

a. Petitioners recognize (Pet. 9) that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). See, *e.g.*, *Bowen* v. *Owens*,

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employee 'balance' established by the Railway Labor Act" (*id.* at 18a). And the court found (*ibid.*) that "[t]he remaining objections in the Airlines' broadside attack are equally frivolous and must be rejected." Petitioners do not renew these objections in their petition.

[4] The court of appeals reversed the district court decision only to the extent that it had struck down a portion of the regulations that generally prohibit employers from using maximum hiring age criteria in implementing the duty to hire (Pet. App. 4a). The court of appeals also vacated and remanded a portion of the district court decision to allow the Secretary to clarify the scope of the equal employment opportunity exception to the duty to hire, embodied in 29 C.F.R. 220.29 and 220.01(j) (Pet. App. 5a). These issues are not presented in the petition.

476 U.S. 340 (1986); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955). Petitioners contend (Pet. 9-16), nonetheless, that the duty to hire violates both the Takings Clause and equal protection component of the Fifth Amendment – first, because it is purportedly imposed "exclusively on companies with no previous relationship to the protected employee whatsoever" (*id.* at 13); and second, because it applies only to airlines that were certificated prior to the enactment of the Deregulation Act. Both claims are mistaken.

First, petitioners misstate the way in which the duty to hire operates. Section 43(d) does *not* impose the duty to hire only on airlines that had no connection to the protected employee. Petitioners base their contrary conclusion on the sentence in Section 43(d) (emphasis added) that provides that once a protected employee is furloughed or otherwise terminated, he "shall have a first right of hire * * * by any *other* air carrier [certificated before the enactment of the Deregulation Act]". But that Section also provides that "[e]ach such air carrier hiring additional employees shall have a duty to hire such a person [i.e., a protected employee] before they hire any other person, except that such air carrier may recall any of its own furloughed employees before hiring such a person." It is thus clear that the airline that placed the protected employee on furlough has a duty to hire him once it begins to hire additional employees. Indeed, the statute explicitly provides that an airline may give priority to the rehiring of its own protected furloughed employees.[5]

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[5] Petitioners are also mistaken in suggesting (Pet. 11) that the duty to hire provision requires previously-certificated carriers to hire "less qualified and able" employees. The Secretary's regulations permit carriers to require that job applicants, including protected employees, meet standard qualifications set by the carriers and give the carriers discretion to choose from the pool of protected employees. 29 C.F.R. 220.20(a) and (c). Airlines may also require protected employees to

Petitioners' assertion that Section 43(d) "unfair[ly] discriminat[es]" (Pet. 14) between airlines certificated before and after the enactment of the Deregulation Act rests on no sounder footing. In the sphere of economic legislation, "the imposition of liability for effects of disabilities bred in the past [may be] justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor" (*Turner Elkhorn,* 428 U.S. at 18). In this case, as the lower courts observed (Pet. App. 3a-4a, 14a), the airlines that were certificated to do business before deregulation benefited from the prior system, and Congress could rationally conclude "that the beneficiaries of regulation should bear the burden of displacements that might occur as a result of deregulation" (*id.* at 14a).

b. Petitioners further challenge (Pet. 16-21) the constitutionality of the duty to hire provision because, in their view, it is not rationally related to "the *articulated* legislative purpose" (*id.* at 21) of the EPP of "provid[ing] protections for employees adversely affected by deregulation" (*id.* at 17). Petitioners contend that the duty to hire does not promote this legislative purpose principally (1) because the Secretary failed to implement the first part of the statute providing for monthly payments and relocation assistance, and thus "ignored" the mandate of Congress (*id.* at 18), and (2) because the duty to hire protects even employees whose dislocation was not the result of deregulation (*id.* at 19). However, the Secretary elected not to implement the payment provision only because Congress itself chose not to fund the scheme. Thus that portion of the EPP never became operative as a result of Congress' own choice. See *Alaska Airlines,* slip op. 3.

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reveal the status of their seniority or recall rights when applying for jobs and may consider such rights in selecting from the protected pool. 29 C.F.R. 220.21(a)(2).

Further, there is nothing irrational about extending the duty to hire to employees whose termination was not apparently the product of deregulation. As the district court found (Pet. App. 12a), the difficulty of determining whether a given employee was, in fact, affected by deregulation justified Congress in formulating "a broad definition of the duty to hire"—extending that duty to include all protected employees who were furloughed or otherwise terminated, other than for cause, during the ten years following the enactment of the Deregulation Act.

c. Finally, petitioners contend (Pet. 23-27) that the Secretary's regulation extending the duty to hire to employees whose dislocation was not the result of deregulation is not "in harmony with the purpose of the authorizing legislation" (*id.* at 23). Petitioners do not dispute, however, that the language chosen by Congress to establish the duty to hire was intentionally broad. In marked contrast to the prerequisites for monthly assistance under the EPP, there is no clause in the duty to hire provision limiting coverage to those employees who were deprived of employment or compensation due to "a qualifying dislocation" (see 49 U.S.C. App. 1552(a)(1)). As the district court explained (Pet. App. 10a (footnote omitted)), petitioners "cannot ignore this difference in terminology or dismiss it as accident or mistake. Congress used different terms, separately and carefully defined to describe the employees eligible for these two programs. Only those who are seeking monetary assistance from the government are required to make the rigorous showing that deregulation was the cause of their termination. 'Protected employees' who cannot make this showing are still 'protected' by the duty to hire provision." See *INS* v. *Cardoza-Fonseca,* No. 85-782 (Mar. 9, 1987), slip op. 8-10.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
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Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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RESPONSE OF RESPONDENT AIR LINE PILOTS ASSOCIATION IN OPPOSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONSE OF RESPONDENT AIR LINE PILOTS ASSOCIATION IN OPPOSITION

For the reasons stated in the brief for the Secretary of Labor in opposition to the petition for certiorari, the Air Line Pilots Association ("ALPA") submits that the decision of the court of appeals was correct, that the issues raised by the petition do not warrant consideration by this Court in any event, and that, accordingly, the petition should be denied. We present this statement in opposition in order to set forth ALPA's position on the petition without burdening the Court with what would be essentially a repetition of the arguments advanced by the Solicitor General.[1]

[1]ALPA is a labor organization which is the bargaining agent for approximately 40,000 commercial airline pilots employed by 46 U.S. carriers. Because of the obvious interest of its members in the "first right of hire" employee protection provision which

Respectfully submitted,

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was enacted for their benefit -- Section 43(d) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, *et seq.*, codified as 49 U.S.C. App. § 1552(d) -- ALPA intervened as a defendant in the district court, was an appellee/cross-appellant in the court of appeals, and was one of the respondents in this Court when the case was before it last term on the legislative veto issue. *Alaska Airlines, Inc. v. Brock,* 107 S. Ct. 1476 (1987).

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No. 87-49

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF

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REPLY BRIEF

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1. Respondents misread a crucial provision in Section 43 of the Airline Deregulation Act of 1978 that is highly relevant to the constitutional question presented. Respondents claim that the statute does not impose the duty to hire a "protected employee" exclusively on air carriers with no previous relationship to the protected employee. Respondents are 100 percent wrong. For, section 43(d) expressly limits the hiring duty, providing only that a protected employee furloughed by an air carrier "shall have first right of hire . . . by any *other* air carrier . . . ." 49 U.S.C. app. § 1552(d)(1) (1982) (emphasis added). The next sentence refers back to the description "by any *other* air carrier:"

> Each *such* air carrier hiring additional employees shall have a duty to hire such a person before they hire any other person, except that such air carrier *may* recall any of its own furloughed employees before hiring such a person.

49 U.S.C. app. § 1552(d)(1) (1982) (emphasis added).

2. If Congress had intended to impose on the air carrier that furloughed the protected employee a statutory duty to rehire such former employee, it would have said so by omitting the word "other." It would not have expressly limited the hiring right to "any *other* air carrier." Further, under respondents' construction, the exception clause quoted above is inconsistent with the carriers' obligation. Congress would not have granted permissive authority to an air carrier to recall its own furloughed protected employees—"such air carrier *may* recall any of its own furloughed employees"—if the carrier had a statutory duty to rehire such employees.

3. As a practical matter, the hiring burden falls on air carriers which, having no employees of their own to recall, are obligated to hire the protected former employees of their competitors. Through its distorted construction of the statute, however, respondents strain to create some nexus between the burden imposed on a particular air carrier and the benefit bestowed on a "protected employee." Respondents apparently believe that this strained interpretation is important to their position because in the cases they cite, this Court has found such a nexus essential, *see e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19-20 (1976) (due process clause does not bar requiring an operator to compensate for a former employee's death or disability arising out of his employment in the operator's mines). The statutory language, however, provides no connection whatsoever between the statutory burden imposed on a particular air carrier and any obligation it may have to its former

employees. Moreover, contrary to the rationale of *Turner Elkhorn* upon which they rely, even respondents do not dispute that Section 43 imposes on carriers a duty to hire employees with whom they have had no prior relationship.

4. Respondents also dispute petitioners' contention that the hiring provisions require air carriers to hire "less qualified and able" employees, arguing that job applicants must meet "standard qualifications set by the carriers" and carriers may choose among protected employees. *See* Opposition Brief of Secretary of Labor at 6 n.5. But all qualified applicants are not equally qualified. Lawyers who have graduated from law school and passed the bar may be considered qualified by these facts alone for a position on the General Counsel's staff, but clearly some applicants are more qualified than others. Similarly, although many pilot applicants may be qualified, some candidates obviously will make better pilots than others. Where two applicants are qualified and only one is "protected," respondents would require the airline to hire the "protected employee." But the ability to select the best applicant is essential in an industry in which reducing pilot error to an absolute minimum is a matter of increasing emphasis. *See* 49 U.S.C. app. § 1421(b) (carriers' obligation to achieve "the highest possible degree of safety").

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